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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WARNER JACKSON, *et al.*,
Petitioners,

v.

JOHN T. BENSON, *et al.*,
Respondents.

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, *et al.*,
Petitioners,

v.

JOHN T. BENSON, *et al.*,
Respondents.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Petitioners,

v.

JOHN T. BENSON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Wisconsin has enacted a private school voucher program for the City of Milwaukee. Under this program, the State will expend millions of tax dollars each school year to pay for thousands of elementary and secondary school students to attend private schools, the overwhelming majority of which are pervasively sectarian, and the private schools that receive these tax dollars will be free to use them for any secular or sectarian purposes they deem appropriate. The Supreme Court of Wisconsin held that the Milwaukee voucher program does not violate the Establishment Clause of the First Amendment to the United States Constitution. The following questions are presented for review:

1. Does the Milwaukee voucher program violate the Establishment Clause?

2. Is the decision of the Supreme Court of Wisconsin in conflict with this Court's decision in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), and, if so, does *Nyquist* continue to state the law?

PARTIES

This Petition for a Writ of Certiorari is filed on behalf of the following Petitioners, who, in three consolidated cases, were plaintiffs in the trial court and respondents in the Wisconsin Supreme Court: Warner Jackson, Jennifer Evans, Wendell Harris, The Reverend Andrew Kennedy, Rabbi Isaac Serotta, Ceilanne Libber, Father Thomas J. Mueller, Reverend John N. Gregg, Diane Brewer, Coleen Beaman, Mary Morris, Penny Morse, Kathleen Jones, Philip Jones, Milwaukee Teachers' Education Association, by its President, M. Charles Howard, Michael Lengyel, Donald Lucier, Tracy Adams, Milwaukee Public Schools Administrators and Supervisors Council, Inc., by its Executive Director, Carl A. Gobel, People for the American Way, by its Executive Vice President and Legal Director, Elliot M. Mincberg, John Drew, Susan Endress, Richard Riley, Jeanette Robertson, Vincent Knox, Bertha Zamudio, James Johnson, Robert Ullman, Sally F. Mills, National Association for the Advancement of Colored People, Felmers O. Chaney, Lois Parker, on behalf of herself and her minor child, Rashaan Hobbs, Derrick D. Scott, on behalf of himself and his minor children, Deresia C.A. Scott and Desmond L.J. Scott, Constance J. Cherry, on behalf of herself and her minor children, Monique J. Branch, Monica S. Branch, and William A. Branch.

Respondents, who were defendants in the trial court and petitioners in the Wisconsin Supreme Court, are: John T. Benson, Superintendent of Public Instruction of Wisconsin, Wisconsin Department of Public Instruction, and James E. Doyle, Attorney General of Wisconsin. Additional respondents are the following persons who intervened as defendants in the trial court and were petitioners in the Wisconsin Supreme Court: Marquelle Miller, Cynthia Miller, Angela Gray, Zachery Gray, Shon Richardson, George Richardson, Latrisha Henry, Faye Henry, Reigne Barrett, Valerie Barrett, Candice Williams,

Senton Williams, Clintrai Giles, Sharon Giles, Parents for School Choice, Pilar Gonzalez, Dinah Cooley, Julie Vogel, Kate Helsper, Blong Yang, Gail Crockett, Yolanda Lassiter, and Jeanine Knox.

The following persons were also parties to this case or a closely related proceeding at earlier stages of the litigation: Representative Annette Polly Williams, as an intervening defendant in the trial court; and State of Wisconsin *ex rel.* Tommy G. Thompson, Governor, as petitioner in an original action before the Wisconsin Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Supreme Court of Wisconsin in *Jackson v. Benson, Milwaukee Teachers' Education Association v. Benson, National Association*

for the Advancement of Colored People v. Benson, 218 Wis. 2d 835, 578 N.W.2d 602 (1998).

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported at 218 Wis. 2d 835, 578 N.W.2d 602, and is reproduced in the Appendix to this Petition at 1a. The opinion of the Court of Appeals of Wisconsin is reported at 213 Wis. 2d 1, 570 N.W.2d 407, and is reproduced in the Appendix at 59a. The opinion of the Dane County Circuit Court is unreported, and is reproduced in the Appendix at 138a. The earlier opinion of the Supreme Court of Wisconsin in *State ex rel. Thompson v. Jackson* is reported at 199 Wis. 2d 714, 546 N.W.2d 140, and is reproduced in the Appendix at 189a.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on June 10, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The text of Wis. Stat. § 119.23 is reproduced in the Appendix at 192a.

STATEMENT OF THE CASE

A. Statement of Facts

This case presents an Establishment Clause challenge to the 1995 amendments to the Milwaukee Parental Choice Program ("Amended MPCP"), Wis. Stat.

§ 119.23. Under the Amended MPCP, the State of Wisconsin will divert millions of tax dollars each school year from state aid that otherwise would be provided to the Milwaukee Public Schools (as much as $70,000,000 during the 1998-99 school year alone), and use that money to pay for up to 15,000 students to attend private schools, the overwhelming majority of which are pervasively sectarian.

The Amended MPCP had its genesis in a much smaller, exclusively nonsectarian, program enacted in 1989 ("Original MPCP"). The Original MPCP, as amended in 1993, permitted Milwaukee students from low-income families—up to a maximum of 1.5% of the approximately 100,000 total student population of the Milwaukee Public Schools—to attend at state expense private nonsectarian schools in Milwaukee that chose to participate in the Program. For each student attending a private school pursuant to the Program, the State paid directly to the participating private school an amount equal to the state aid that otherwise would have been paid to the Milwaukee Public Schools. The private school was not permitted to charge any additional tuition.

The 1995 amendments opened the Program to all sectarian private schools in Milwaukee and increased the cap on the number of participating students from 1.5% of the Milwaukee Public Schools student population (approximately 1,500) to 15% (approximattely 15,000). The stipulated record in this case establishes that, as of the 1995-96 school year, 122 private schools in Milwaukee were eligible to participate in the Amended MPCP. Of these 122 schools, 33 were nonsectarian, and 17 of those had elected to participate in the Original MPCP. The remaining 89 private schools eligible to participate in the Program—comprising 73 percent of the total number of Milwaukee private schools—were sectarian. During the 1994-95 school year, these sectarian schools enrolled ap-

proximately 84 percent of all Milwaukee private-school students.

The stipulated record includes as exhibits handbooks, mission statements, and other written materials issued by many of the sectarian private schools that had notified the Wisconsin Department of Public Instruction of their intent to participate in the Amended MPCP during the 1995-96 school year. The parties have agreed that these materials accurately describe the purpose, structure, and operation of those schools. As the trial court found, these materials make it clear that the "mission" of those schools is "religious," App. 147a, that "religious doctrine will be instilled in their students," *id.*, and that "one of the primary means by which these schools accomplish their religious missions is by integrating the religious and secular aspects of the schools' educational programs." App. 149a.[1] In addition, as the court of appeals found, these materials "indicate that many [of these schools] charge tuition that is hundreds of dollars less than what the schools deem to be their actual cost of educating each student," and are able to do so by virtue of subsidies they receive from the churches or other religious organizations that operate them. App. 67a.

Under the Amended MPCP, for each student enrolled under the Program the State pays "an amount equal to the private school's operating and debt service cost per pupil that is related to educational programming," Wis. Stat. § 119.23(4), so long as that amount does not

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[1] By way of example, the Holy Redeemer Christian Academy's Parent Handbook describes the school as "an integral part of the ministry of Holy Redeemer Church of God in Christ," at which "all learning will be rooted in the understanding of faith in God and power of His word." The school's "goals and objectives" include "[t]o lead the student to a saving knowledge of Jesus Christ" and "[t]o present all academic subject areas in light of the Scriptures." *See also* App. 147a-151a (compilation by trial court of excerpts from other such materials).

exceed the per-pupil state aid provided to the Milwaukee Public Schools—which, during the 1995-96 school year, was approximately $3,650. The Amended MPCP does not limit this payment to the actual tuition charged; thus, as the parties have stipulated, the State will pay most of the participating sectarian schools *more* per pupil than those schools would otherwise charge in tuition.

Multiplied by the cap of roughly 15,000 eligible students, the Amended MPCP reimbursement formula would have resulted in upwards of $55 million of public funds being diverted from the budget of the Milwaukee Public Schools and paid to private schools instead, had the program taken effect during the 1995-96 school year as originally scheduled. Because of increases in the amount of per-pupil state aid since 1995, the cost of the Program could be as much as $70 million during the 1998-99 school year.

The State's expenditures under the Amended MPCP are by checks made payable to the parents of the students, rather than to the private schools as was the case under the Original MPCP. The checks are, however, mailed directly to the private schools, and the parents are then required by law to "restrictively endorse the check for the use of the private school." Wis. Stat. § 119.23(4).

The Amended MPCP does not require that the public funds provided to participating sectarian schools be used only for secular purposes, nor does it otherwise restrict the uses to which these funds may be put by the schools or the churches that operate them. These funds may be used for any secular or sectarian purposes the schools deem appropriate, including the payment of salaries and expenses of employees affiliated with the schools' religious mission, the purchase of religious literature and materials, and the maintenance and construction of facilities used for religious purposes.

The funding provided by the Amended MPCP is limited to students who enroll in private schools; the Program provides no benefits for students who remain in the Milwaukee Public Schools. *See* Wis. Stat. § 119.23. To the contrary, for each student enrolled in a private school under the Amended MPCP, the State proportionately reduces its payment to the Milwaukee Public Schools, without regard to whether the school district experiences a proportionate reduction in its costs. Wis. Stat. § 119.23(5)(a).

B. Proceedings Below

On August 1, 1995, a week after enactment of the Amended MPCP and less than a month before it was scheduled to take effect, two lawsuits were filed by various parents, taxpayers, teachers, members of the clergy, and certain organizations that represent the individual plaintiffs. Another group of plaintiffs, the National Association for the Advancement of Colored People ("NAACP"), *et al.*, subsequently filed a separate lawsuit. In addition to advancing several claims under the Wisconsin Constitution, each of the three complaints sought to have the Amended MPCP struck down as violative of the Establishment Clause of the First Amendment to the United States Constitution.[2]

The three lawsuits were consolidated, and two groups of parents and associated organizations—Parents for

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[2] The NAACP petitioners also alleged a violation of the Equal Protection Clause of the Fourteenth Amendment. The trial court stayed further proceedings on that claim pending resolution of the other issues, and the claim was not addressed by the Wisconsin Court of Appeals. Treating NAACP's Equal Protection claim as a facial challenge, the Wisconsin Supreme Court, on its own motion, dismissed the claim notwithstanding that it had not been considered by the lower courts. App. 52a-56a. Although the NAACP petitioners believe the court's disposition of their Equal Protection claim was erroneous, that claim is not raised here.

School Choice, *et al.*, and Marquelle Miller, *et al.*— were permitted to intervene on the side of defendants.

After plaintiffs in the first two lawsuits moved for a preliminary injunction, the Wisconsin Supreme Court, on petition of Governor Tommy G. Thompson, assumed original jurisdiction over the matter and stayed further proceedings in the trial court. Shortly thereafter, the supreme court preliminarily enjoined implementation of the Amended MPCP. All parties agreed to a stipulated factual record, and following briefing and argument of the state and federal constitutional issues, on March 29, 1996, an equally divided supreme court dismissed the original action, lifted the stay of proceedings in the trial court, and ordered that the preliminary injunction remain in place. *State ex rel. Thompson v. Jackson*, App. 189a.[3]

The parties then filed cross-motions for summary judgment in the trial court, again arguing the constitutionality of the Amended MPCP under both the United States and Wisconsin Constitutions. Following briefing and argument, the trial court ruled, on January 15, 1997, that the Amended MPCP was unconstitutional under several provisions of the Wisconsin Constitution, including its religion clause, Art. I, § 18. App. 138a. Having struck down the Amended MPCP on state constitutional grounds, the trial court found it unnecessary to address petitioners' further contention that the Program also violated the Establishment Clause of the First Amendment to the United States Constitution. *See* App. 139a.

On August 22, 1997, the Wisconsin Court of Appeals affirmed, with one judge dissenting. App. 59a. Although

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[3] With one justice not participating, three justices would have held the Amended MPCP unconstitutional under the religion and education clauses of the Wisconsin Constitution, without reaching the federal issue, while the other three justices believed the Program withstood challenge on all federal and state grounds presented. App. 190a.

the court of appeals rested its decision on the Wisconsin religion clause, and found it unnecessary to decide the First Amendment issue that the parties also had briefed and argued, App. 87a, the court believed it appropriate, in construing the state constitution's religion clause, to "consult United States Supreme Court cases applying the 'primary effect' test." App. 80a. In so doing, the court followed the holding of *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), which struck down a private-school voucher program that, the court of appeals found, "closely parallels the amended program here under review." App. 81a. The court of appeals concluded that this Court's more recent cases on which the State had relied "do not encompass facts nearly so close to those before us as did *Nyquist*." App. 83a.

The State and the intervenors-defendants appealed to the Wisconsin Supreme Court. The parties again briefed and argued both the federal and state constitutional issues. On June 10, 1998, the court reversed, upholding the Amended MPCP against all challenges by a vote of 4-2. App. 1a.[4]

Addressing the constitutionality of the Amended MPCP under the Establishment Clause, the Wisconsin Supreme Court surveyed this Court's Establishment Clause cases, and found those cases to rest on what it termed the principles of "neutrality and indirection." App. 17a. The court explained its position as follows:

> [S]tate educational assistance programs do not have the primary effect of advancing religion if those programs provide public aid to both sectarian and nonsectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age chil-

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[4] The two dissenting justices would have affirmed on the basis of the reasoning of the court of appeals. App. 58a.

> dren. The amended MPCP is precisely such a program. [App. 25a.]

On this view of the Establishment Clause, the court deemed it "irrelevant to our inquiry"—*i.e.*, to determining whether the Amended MPCP would have the "primary effect of advancing religion"—that, in practical terms, the principal option that would be offered to students under the Amended MPCP would be to enroll in a pervasively sectarian private school; that the vast majority of students participating in the Amended MPCP would be enrolled in such schools; and that most of the public funds made available under the Amended MPCP would flow to those schools to be used for any secular or religious purposes they deemed appropriate. App. 28a, n.17.

Although it agreed with the court of appeals that the Amended MPCP "closely parallels" the private school voucher program held to be unconstitutional in *Nyquist*, the Wisconsin Supreme Court opined that the *Nyquist* program was distinguishable from the Amended MPCP. As the court put it, the former program "directed aid exclusively to private schools and their students," and hence, in the court's view was "non-neutral"; in contrast, the court concluded that "[t]he amended MPCP, viewed in its surrounding context, merely adds religious schools to a range of pre-existing educational choices available to [Milwaukee] children." App. 19a n.9.

REASONS FOR GRANTING THE WRIT

In this case, the Wisconsin Supreme Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). That question is central both to the development of this Court's Establishment Clause jurisprudence and to the formulation of this nation's education policy, and it therefore warrants the attention of this Court.

1. In *Nyquist, supra,* this Court struck down a private-school voucher program that had been enacted by the State of New York, holding that the use of public money to "subsidize and advance the religious mission of sectarian schools," 413 U.S. at 779-80, crossed the line between church and state drawn by the Establishment Clause. Although the Wisconsin Supreme Court acknowledged that the Amended MPCP "closely parallels" the New York program, it concluded that the two programs were distinguishable. Its reasoning in this regard cannot bear scrutiny, and, in point of fact, the highest court of the State of Wisconsin has rendered a constitutional decision that is in direct and irreconcilable conflict with a decision of this Court.

Nyquist is this Court's last word on the constitutionality of private-school voucher programs such as the Amended MPCP. But the jurisprudential situation is complicated by the fact that, in several post-*Nyquist* cases, this Court has sustained the constitutionality of programs that, while factually removed from those at issue here and in *Nyquist*, provided various types of aid to students who attended sectarian private schools. These intervening Establishment Clause cases have led to the suggestion that *Nyquist* no longer is good law. Whether that is so only this Court can decide, and it should grant certiorari in order to do so.

2. Resolution of the questions presented for review is important for practical as well as doctrinal reasons. Under the Amended MPCP, the State of Wisconsin will, during the 1998-99 school year alone, divert up to $70,000,000 of public funds from the Milwaukee Public Schools and use that money to pay for as many as 15,000 students to attend private schools, the overwhelming majority of which are pervasively sectarian. Moreover, efforts are underway to enact voucher programs elsewhere, and the national policy debate that is unfolding in these other forums is shrouded in what counsel for intervenors-de-

fendants in the instant case aptly has termed a "constitutional cloud." [5] Because this case poses the Establishment Clause question raised by voucher programs in direct and pristine form, it offers this Court a timely and appropriate opportunity to resolve the uncertainty, so that the debate over voucher programs can focus on education policy rather than constitutional law.

I. THE DECISION OF THE COURT BELOW IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THE DECISION OF THIS COURT IN *COMMITTEE FOR PUBLIC EDUCATION v. NYQUIST*; THIS COURT SHOULD CLARIFY WHETHER THAT CASE CONTINUES TO STATE THE LAW

A. In 1972, the State of New York enacted a private-school voucher program that provided tuition reimbursements for children from low-income families who attended private schools, including both sectarian and nonsectarian private schools. In enacting this program, the New York legislature found that a "healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences." [6] In defending the program, New York emphasized as well the plight of children attending "the inner city poverty area schools" which are "undersized and overcrowded." [7] These are essentially the same justifications that have been advanced for the Amended MPCP.

Notwithstanding these asserted justifications, this Court held in *Nyquist* that the New York voucher program violated the Establishment Clause. The *Nyquist* Court's analysis began from the premise that "[t]here can be no

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[5] Clint Bolick, *School Choice and the Supreme Court*, Wall St. J., June 15, 1998, at A29.

[6] New York Laws 1972, c. 414 § 2, *quoted in Nyquist*, 413 U.S. at 764.

[7] Brief of Appellee Warren M. Anderson at 14, *Nyquist*, *supra*.

question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools," because the program contained no "effective means of guaranteeing that the state aid derived from public funds w[ould] be used exclusively for secular, neutral, and nonideological purposes." 413 U.S. at 780.

This Court went on to reject the proposition that "deliv[ering]" the tuition reimbursements "to parents rather than schools is of such significance as to compel a contrary result." *Id.* at 781. As this Court explained, despite the fact that the aid was channeled to religious schools through parents,

> it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. . . . [T]he effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions. [*Id.* at 783.]

The instant case does not just "closely parallel[]" *Nyquist*, as the court below acknowledged, *see supra* p. 9; it is on all fours with *Nyquist*. Indeed, the unconstitutionality of the Amended MPCP follows *a fortiori* from *Nyquist*. Under the New York voucher program, the maximum tuition reimbursement any parent could receive was the lesser of $100 or 50% of the amount of tuition actually paid by the parent. In contrast, the Amended MPCP covers the full cost of a private school education (up to the amount of state per-pupil assistance), and will result in payments to most participating sectarian private schools in *excess* of the tuition those schools in fact charge. *See supra* pp. 4-5. Simply stated, if the Establishment Clause does not allow the State of New York to provide $100 tuition reimbursements to parents who enroll their children in pervasively sectarian

private schools because such payments impermissibly advance religion, the Establishment Clause surely does not allow the State of Wisconsin to pay over $3,000 for children to attend such schools.[8]

Conversely, if—as the Wisconsin Supreme Court held—the Establishment Clause requires only "neutrality" and "indirection" (as defined by the court below), *see supra* pp. 8-9, the New York private-school voucher program easily should have passed constitutional muster. Like the Amended MPCP, the New York program "provide[d] public aid to both sectarian and nonsectarian institutions . . . on the basis of neutral, secular criteria that neither favor nor disfavor religion." App. 25a. And, again like the Amended MPCP, the financial aid that was provided to the sectarian private schools under the New York program was "indirect" in the sense that the aid was received "only as a result of numerous private choices of the individual parents of school-age children." *Id.*[9] The fact that the principles that informed the decision of the Wisconsin Supreme Court in this case would have required a different outcome in *Nyquist* confirms that the decision below is in direct and irreconcilable conflict with *Nyquist*.[10]

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[8] Moreover, in contrast to the Amended MPCP, the New York voucher program did not require parents to endorse the checks they received to the private schools, and thus did not result in any direct flow of state funds to the schools.

[9] The Wisconsin court's exclusive reliance on the manner in which public funds reached the sectarian schools as its basis for concluding that such funding was "indirect" cannot be squared with this Court's holdings in funding cases that look not only to the manner of payment but also scrutinize whether public funding "relieve[s] sectarian schools of costs they otherwise would have borne in educating their students," thereby resulting in " 'the direct and substantial advancement of religious activity.' " *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 12 (1993) (quoting *Meek v. Pittenger*, 421 U.S. 349, 366 (1975)).

[10] Although, as the Wisconsin Supreme Court noted, the New York voucher program "directed aid exclusively to private schools

Nor is *Nyquist* the only decision of this Court that cannot be squared with the Wisconsin Supreme Court's view of the Establishment Clause. As this Court recently observed, "special Establishment Clause dangers [are posed] where the government makes direct money payments to sectarian institutions." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995). Consistent with that observation, this Court repeatedly has held that such aid violates the Establishment Clause unless it is restricted in a manner that effectively prevents its use for religious purposes.[11] The decision below conflicts with these decisions as well.

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and their students," App. 19a n.9, the same is true here: the Amended MPCP also provides aid "exclusively to private schools and their students"; indeed, the very point of the Program is to enable low-income students in Milwaukee to enroll in private schools instead of remaining in the Milwaukee Public Schools.

[11] *See Sloan v. Lemon*, 413 U.S. 825 (1973) (companion case to *Nyquist*); *Tilton v. Richardson*, 403 U.S. 672, 683 (1971) (plurality) (finding insufficiently protective a 20-year ban on the religious use of a facility built with government aid); *Levitt v. Committee for Public Educ.*, 413 U.S. 472, 480 (1973) (striking down reimbursement to sectarian private schools for testing expenses because "no means are available, to assure that internally prepared tests are free of religious instruction"); *Meek v. Pittenger*, 421 U.S. 349, 365-366 (1975) (striking down material and equipment loan program to pervasively sectarian private schools and concluding that substantial aid to such institutions "necessarily results in aid to the sectarian school enterprise as a whole"); *Wolman v. Walter*, 433 U.S. 229, 254 (1977) (striking down provision of field trip funds to sectarian schools because "public school authorities will be unable adequately to insure secular use of the field trip funds"); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (striking down Community Education program under which sectarian school teachers received public funds to teach secular subjects in their own pervasively sectarian schools), *overruled in other part, Agostini v. Felton*, 117 S. Ct. 1997 (1997); *Essex v. Wolman*, 409 U.S. 808 (1972) (mem.), *aff'g* 342 F. Supp. 399 (S.D. Ohio 1972); *cf. Bowen v. Kendrick*, 487 U.S. 589, 621 (1988) (remanding for determination of whether government grant program unconstitutionally directed aid to "'pervasively sectarian' religious institutions, such as we have held parochial schools to be"); *Roemer v. Board of Public*

Moreover, the decision of the Wisconsin Supreme Court also is at odds with decisions of the highest courts of other states. These courts—consistent with *Nyquist* and this Court's other on-point precedents—have struck down, under the Establishment Clause, programs providing unrestricted tuition payments or grants for attendance at sectarian private schools.[12]

B. Seen through the lens of *Nyquist*, this is an open-and-shut case on the merits. Apparently recognizing this, intervenors-defendants Parents for School Choice argued in the court below that in light of this Court's more recent Establishment Clause cases *Nyquist* should be treated as an "aberration." While we firmly reject that premise, the key point for present purposes is that this Court—as it recently has reiterated—retains for itself "the prerogative of overruling its own decisions." *Agostini v. Felton*, 117 S. Ct. 1997, 2017 (1997) (quoting *Rodriguez de Quijas*

Works, 426 U.S. 736, 746-48 (1976) (upholding general aid program for secondary educational institutions on the ground that aid was limited to secular purposes); *Hunt v. McNair*, 413 U.S. 734, 743-44 (1973) (upholding financing assistance to sectarian college on the ground that aid was restricted in a manner that prevented its use for religious purposes); *Board of Educ. v. Allen*, 392 U.S. 236, 244-48 (1968) (upholding textbook loan program for private schools that was limited to secular purposes).

[12] *See Almond v. Day*, 89 S.E.2d 851, 857-58 (Va. 1955) (program of state tuition payments on behalf of children of war veterans violated Establishment Clause insofar as payments were made to sectarian private schools); *People ex rel. Klinger v. Howlett*, 305 N.E.2d 129 (Ill. 1973) (striking down program under which state paid a portion of tuition expenses incurred by low-income parents who sent their children to private schools, including sectarian private schools); *Weiss v. Bruno*, 509 P.2d 973, 981-984 (Wash. 1973) (tuition payments on behalf of students enrolled in primary, secondary, or post-secondary educational institutions violated Establishment Clause because payments were unrestricted and were directed predominantly to sectarian schools); *State ex rel. Rogers v. Swanson*, 219 N.W.2d 726, 735 (Neb. 1974) (grants to students attending private colleges violated Establishment Clause because most recipient colleges were sectarian and no restrictions were placed on use of grants).

v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)). In view of the questions that have been raised about the continuing vitality of *Nyquist*—as evidenced by the decision below—it is time for this Court to say clearly whether or not that case still is good law.

The attack on *Nyquist* is bottomed on five cases decided by this Court during the past fifteen years: *Mueller v. Allen*, 463 U.S. 388 (1983), sustaining a provision of Minnesota's tax code allowing all taxpayers to deduct from their taxable income up to $700 in educational expenses, including expenses for sectarian private school tuition; *Witters v. Washington Dep't of Serv. for Blind*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993), upholding programs of public assistance to disabled students, including students enrolled in sectarian private schools; *Rosenberger, supra*, holding that a state university could make disbursements from a student activities fund to cover printing costs of a religious student group; and *Agostini, supra*, holding that public school teachers could provide remedial educational services on the premises of sectarian private schools.

Although, as the Wisconsin Court of Appeals pointed out, the foregoing cases "do not encompass facts nearly so close to those before us as did *Nyquist*," App. 83a, there are those—including the court below—who read these cases for the broad principle that *any* state support for religious education is constitutionally acceptable so long as it "distributes benefits neutrally . . . without regard to the 'sectarian-non-sectarian, or public-nonpublic nature' of the school the child attends," and reaches sectarian schools "only as a result of the private decision of individual parents." *Zobrest*, 509 U.S. at 10; *see also Mueller*, 463 U.S. at 398-99; *Witters*, 474 U.S. at 488; *Agostini*, 117 S. Ct. at 2014. As Professors Eisgruber and Sager observe in a recent article in the *Supreme Court Review*:

> Under the broadest principle . . . articulated in *Agostini*—pursuant to which no constitutional vio-

> lation exists if public benefits flow to religious schools as a result of private choices—the tuition voucher programs from Wisconsin and Ohio would survive constitutional challenge, since parents decide whether to send their children to religious or secular schools.[13]

If that indeed is the controlling constitutional principle, then *Nyquist* no longer is good law. Under that principle, any and all financial aid to private schools that is geared to the schools' enrollment would pass constitutional muster—including even direct per-pupil grants—because the sectarian private schools' share of such aid necessarily would be the "result of private choice," and hence "neutral."

But, as Professors Eisgruber and Sager also point out, that is not the only reading of *Agostini* and its antecedent cases:

> If . . . it matters whether state dollars reach religious coffers, the [voucher] cases[s] would go the other way: unlike in *Agostini* and *Rosenberger*, there is no doubt that the voucher system adds public money to the accounts of religious educational programs.[14]

Although a full exploration of this Court's post-*Nyquist* Establishment Clause jurisprudence must be reserved for briefing on the merits, we submit that this latter interpretation reflects a proper reading of these more recent cases —and that these cases are in full accord with the holding of *Nyquist*.

It is very much to the point that none of the cases from *Mueller* to *Agostini* upholds a program that is even remotely like the Amended MPCP in terms of the manner

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13 Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 Sup. Ct. Rev. 79, 126-27.

14 *Id.* at 127.

and extent of the state aid provided to sectarian private schools. In *Mueller*, *Witters*, and *Zobrest*, the benefits flowing to sectarian private schools were, at most, "attenuated." *Mueller*, 463 U.S. at 399. In *Rosenberger*—a case involving a public forum in which the government promoted speech by others—this Court emphasized that "[o]ur decision . . . cannot be read as addressing an expenditure from a general tax fund." 515 U.S. at 841. Indeed, contrary to the Wisconsin Supreme Court's embrace of the "neutrality principle" as the key to the Establishment Clause, *Rosenberger* "neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence." *Id.* at 852 (O'Connor, J., concurring).

References to *Agostini* likewise are far off the mark, inasmuch as that case did not involve the transfer of any public funds to sectarian private schools. And, in *Agostini* this Court was able to rely on the assurances that, under the Title I program there at issue, "[n]o [public] funds ever reach the coffers of religious schools," 117 S. Ct. at 2013; the publicly financed educational services would be provided by public school teachers who were "accountable only to their public school supervisors," *id.* at 2004; and the program would not have the impermissible consequence of "reliev[ing] sectarian schools of costs they otherwise would have borne in educating their students." *Id.* at 2013 (quoting *Zobrest*, 509 U.S. at 12).

None of that can be said about the Amended MPCP. Indeed, the Amended MPCP more nearly resembles the Community Education program found unconstitutional in the portion of *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), that was not overruled in *Agostini*. As Justice O'Connor explained in her separate opinion in *Ball*:

> When full-time parochial school teachers receive public funds to teach secular courses to their parochial

> school students under parochial school supervision, I agree that the program has the perceived and actual effect of advancing the religious aims of the church-related schools. This is particularly the case where, as here, religion pervades the curriculum and the teachers are accustomed to bring religion to play in everything they teach. [*Id.* at 399-400.]

Voucher programs such as the Amended MPCP, which provide unrestricted funds that the sectarian private schools are entirely free to use for sectarian as well as secular purposes, go even farther in "advancing the religious aims of the church-related schools" than was the case in *Ball*. These voucher programs implicate all of the core concerns of the Establishment Clause: by offering publicly funded sectarian private education as the principal alternative to public schooling, they "can only be regarded as . . . 'advancing' religion," *Nyquist*, 413 U.S. at 788, and creating a " 'symbolic union' between church and state." *Agostini*, 117 S. Ct. at 2012.

Accordingly—whether viewed as a matter of *stare decisis* or as a question of first impression—the Amended MPCP cannot stand.

What is of primary importance for present purposes, however, is not whether we are correct on the merits, but the very fact that this Court's post-*Nyquist* Establishment Clause jurisprudence has proved susceptible to such radically differing interpretations. Only this Court can determine authoritatively which reading of the case law—and of the Establishment Clause itself—is correct. *Agostini*, 117 S. Ct. at 2017. As a matter of constitutional doctrine, that is a question eminently worthy of this Court's consideration; and, as we demonstrate in Point II below, in the real world of practical affairs there is a clear and pressing need for a prompt answer.

II. THIS COURT SHOULD DETERMINE WHETHER THE AMENDED MPCP—WHICH IS AN IMPORTANT PROGRAM IN ITS OWN RIGHT—IS CONSTITUTIONAL, AND SHOULD ANSWER THE CONSTITUTIONAL QUESTION THAT SHROUDS THE NATIONAL POLICY DEBATE OVER VOUCHER PROGRAMS

On its own terms, the Amended MPCP is an important program that will have significant ramifications for taxpayers in the State of Wisconsin and for children in the City of Milwaukee. Under the Program, the State of Wisconsin will divert millions of tax dollars from the Milwaukee Public Schools each school year (up to $70 million during the 1998-99 school year alone) to pay for as many as 15,000 students to attend private schools, the overwhelming majority of which are pervasively sectarian. The Amended MPCP is, moreover, a limited program, which now operates only in a single public school district. Similar programs well may be adopted in other public school districts throughout the State, with a concomitant increase in both the expenditure of public funds and student participation.

Nor are voucher programs a uniquely Wisconsin phenomenon. Efforts to enact similar programs have been undertaken in at least twenty other states, and in the United States Congress as well.[15] According to voucher proponents, the decision below has "thrown wide open the door" to such programs,[16] and it will enable them to "spread like wildfire."[17] The national policy debate

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[15] *See* Harlan A. Loeb & Debbie N. Kaminer, *God, Money and Schools: Voucher Programs Impugn the Separation of Church and State*, 30 J. Marshall L. Rev. 1, 2-3 (1996).

[16] *See* Pete Hutchison, *The Right Education Revolution*, Washington Times, June 15, 1998, at A21. Mr. Hutchison is counsel for one of the groups of intervenors-defendants in this case.

[17] *See* Ethan Bronner, *Wisconsin Court Upholds Vouchers in Church Schools*, N.Y. Times, June 11, 1998, at A3 (quoting William

that is unfolding in these other forums is obscured by the unresolved questions over the constitutionality of voucher programs.[18] All parties to this debate, whatever their views as to the desirability or constitutionality of voucher programs, want—and need—to have those questions resolved.

If, as we believe, the Establishment Clause prohibits the use of public funds to pay for children to attend sectarian private schools, this Court should reaffirm *Nyquist* now, so that those genuinely concerned with improving the quality of education in the United States will be able to re-focus their energies on measures that pass constitutional muster, and a needless, divisive debate between supporters of sectarian education and supporters of public education can be avoided. Alternatively, if *Nyquist* does

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Mellor III, President, Institute for Justice). Mr. Mellor and the Institute for Justice serve as counsel for one of the groups of intervenors-defendants in this case.

[18] Indeed, to our knowledge, every school voucher program that allows for the unrestricted payment of public funds to sectarian private schools has been subject to immediate challenge on the basis of the Establishment Clause and/or analogous state constitutional provisions. *See Simmons-Harris v. Goff*, No. 96APE08-982, 1997 WL 217583 (Ohio Ct. App., May 1, 1997) (holding unconstitutional voucher program similar to Amended MPCP), *appeal pending*, No. 97-1117 (Ohio); *Chittenden Town School Dist. v. Vermont Dep't of Educ.*, No. S0478-96 RcC (Vt. Superior Ct., Rutland Cty., June 27, 1997) (holding that state payment of tuition for sectarian private schools violates Establishment Clause), *appeal pending*, No. 97-275 (Vt.); *Giacomucci v. Southeast Delco School Dist.*, No. 98-5805 (Pa. Common Pleas Ct., Delaware Cty.) (pending challenge to local voucher plan). *See also Kotterman v. Killian*, No. CV-97-0412-SA (Ariz.) (pending challenge to tax credit for contributions to private school scholarship funds); *Bagley v. Maine Dep't of Educ.*, No. CV-97-484 (Me. Superior Ct., Apr. 20, 1998) (rejecting Free Exercise challenge to limitation of voucher program to nonsectarian private schools), *appeal pending*, No. CUM-98-281 (Me.); *Strout v. Commissioner, Maine Dep't of Educ.*, No. 97-259-P-H (D. Me., Aug. 11, 1998) (same), *appeal pending*, No. —— (1st Cir.).

not state the controlling constitutional principle, this Court should overrule it now, so that those who oppose the use of public funds to pay for religious education will be required to make their case solely on the basis of education policy, and not rely on a precedent of this Court that no longer is good law.

Unlike other pending cases challenging voucher programs—which raise variations on the theme posed here in contexts that are *sui generis*, or which for other reasons may not provide this Court with a timely and appropriate vehicle for resolving the constitutional questions raised by voucher programs [19]—this case presents those questions in direct and pristine form. The Amended MPCP involves the systematic expenditure of millions of tax dollars each school year to pay for thousands of elementary and secondary school students to attend private schools, the overwhelming majority of which are pervasively sectarian, and the private schools that receive these tax dollars are free to use them for whatever secular or religious purposes they choose. This Court should grant certiorari to answer the important First Amendment questions raised by this and similar programs, and to clarify the constitutional parameters of the unfolding debate over how best to improve the education of our nation's children.

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[19] *See supra* note 18. The Vermont and Maine cases involve facts peculiar to small school districts in those two states; the Arizona case challenges a tax credit that, while similarly motivated, is factually somewhat removed from the typical voucher program; and the plaintiffs in the Pennsylvania case have limited themselves to state constitutional (and statutory) issues. Only the Ohio case involves a program that parallels the Amended MPCP and the *Nyquist* program, but that case may—as the plaintiffs therein have urged—be decided on state constitutional grounds.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WARNER JACKSON, *et al.*,
Petitioners,
v.
JOHN T. BENSON, *et al.*,
Respondents.

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, *et al.*,
Petitioners,
v.
JOHN T. BENSON, *et al.*,
Respondents.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
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v.
JOHN T. BENSON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

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APPENDIX A

[Filed June 10, 1998]

IN SUPREME COURT
STATE OF WISCONSIN

No. 97-0270

WARNER JACKSON, JENNIFER EVANS, WENDELL HARRIS, THE REVEREND ANDREW KENNEDY, RABBI ISAAC SEROTTA, CEIL ANN LIBBER, FATHER THOMAS J. MUELLER, REVEREND JOHN N. GREGG, DIANE BREWER, COLLEEN BEAMAN, MARY MORRIS, PENNY MORSE, KATHLEEN JONES AND PHILIP JONES,

Plaintiffs-Respondents,

v.

JOHN T. BENSON, Superintendent of Public Instruction, DEPARTMENT OF PUBLIC INSTRUCTION and JAMES E. DOYLE,

Defendants-Appellants-Petitioners,

MARQUELLE MILLER, CYNTHIA MILLER, ANGELA GRAY, ZACHERY GRAY, SHON RICHARDSON, GEORGE RICHARDSON, LATRISHA HENRY, FAYE HENRY, REIGNE BARRETT, VALERIE BARRETT, CANDICE WILLIAMS, SENTON WILLIAMS, CLINTRAI GILES, SHARON GILES,

Intervenors-Defendants-Appellants,

PARENTS FOR SCHOOL CHOICE, PILAR GONZALEZ, DINAH COOLEY, JULIE VOGEL, KATE HELSPER, BLONG YANG, GAIL CROCKETT, YOLANDA LASSITER AND JEANINE KNOX,

Intervenors-Defendants-Appellants-Petitioners.

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, by its President, M. CHARLES HOWARD, MICHAEL LENGYEL, DONALD LUCIER, TRACY ADAMS, MILWAUKEE PUBLIC SCHOOLS ADMINISTRATORS AND SUPERVISORS COUNCIL, INC., by its Executive Director, CARL A. GOBEL, PEOPLE FOR THE AMERICAN WAY, by its Executive Vice President and Legal Director, ELLIOTT M. MINCBERG, JOHN DREW, SUSAN ENDRESS, RICHARD RILEY, JEANETTE ROBERTSON, VINCENT KNOX, BERTHA ZAMUDIO, JAMES JOHNSON, ROBERT ULLMAN AND SALLY F. MILLS,

Plaintiffs-Respondents,

v.

JOHN T. BENSON, Superintendent of Public Instruction, DEPARTMENT OF PUBLIC INSTRUCTION and JAMES E. DOYLE,

Defendants-Appellants-Petitioners,

MARQUELLE MILLER, CYNTHIA MILLER, ANGELA GRAY, ZACHERY GRAY, SHON RICHARDSON, GEORGE RICHARDSON, LATRISHA HENRY, FAYE HENRY, REIGNE BARRETT, VALERIE BARRETT, CANDICE WILLIAMS, SENTON WILLIAMS, CLINTRAI GILES, SHARON GILES,

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Intervenors-Defendants-Appellants-Petitioners.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, FELMERS O. CHANEY, LOIS PARKER, on behalf of herself and her minor child, RASHAN HOBBS, DERRICK D. SCOTT, on behalf of himself and his minor children, DERESIA C.A. SCOTT and DESMOND L.J. SCOTT, CONSTANCE J. CHERRY, on behalf of herself and her minor children, MONIQUE J. BRANCH, MONICA S. BRANCH, and WILLIAM A. BRANCH,

Plaintiffs-Respondents,

v.

JOHN T. BENSON, Superintendent of Public Instruction of Wisconsin, in his official capacity,

Defendant-Appellant.

REVIEW of a decision of the Court of Appeals. *Reversed and cause remanded with directions.*

¶ 1 DONALD W. STEINMETZ, J. This case raises a number of issues for review:

(1) Does the amended Milwaukee Parental Choice Program (amended MPCP) violate the Establishment Clause of the First Amendment to the United States Constitution? Neither the court of appeals nor the circuit court reached this issue. We conclude that it does not.

(2) Does the amended MPCP violate the religious establishment provisions of Wisconsin Constitution art. I, §18? In a divided opinion, the court of appeals held that it does. We conclude that it does not.

(3) Is the amended MPCP a private or local bill enacted in violation of the procedural requirements mandated by Wis. Const. art. IV, § 18? The court of appeals did not reach this question, and the circuit court held it is. We conclude that it is not.

(4) Does the amended MPCP violate the uniformity provision of Wis. Const. art. X, § 3? The court of appeals did not reach this issue, and the circuit court concluded that the amended MPCP does not violate the uniformity clause. We also conclude that it does not.

(5) Does the amended MPCP violate Wisconsin's public purpose doctrine, which requires that public funds be spent only for public purposes? The court of appeals did not reach this issue, and the circuit court concluded that the amended MRCP does violate the public purpose doctrine. We conclude that it does not.

(6) Should children who were eligible for the amended MPCP when this court's injunction issued on August 25, 1995, and who subsequently enrolled in private schools, be eligible for the program if the injunction is lifted? Neither court below addressed this issue. We conclude that they should.

¶ 2 This case is before the court on petition for review of a published decision of the court of appeals, *Jackson v. Benson*, 213 Wis. 2d 1, 570 N.W.2d 407 (Ct. App. 1997). The court of appeals, in a 2-1 decision, affirmed an order of the Circuit Court for Dane County, Paul B. Higginbotham, Judge, granting the Respondents' motion for summary judgment. The majority of the court of appeals concluded that the Milwaukee Parental Choice Program, Wis. Stat. § 119.23, as amended by 1995 Wis. Act 27, §§ 4002-4009 (amended MPCP), was invalid under ArticIe I, § 18 of the Wisconsin Constitution because it directs payments of money from the state treasury for the benefit of religious seminaries. The majority of the court of appeals declined to decide whether the amended MPCP violates the Establishment Clause of the First Amendment or other provisions of the Wisconsin Constitution. In dissent, Judge Roggensack concluded that the amended MPCP did not violate either the federal or state constitution. The State appealed from the decision of the court of appeals. We granted the State's peti-

tion for review and now reverse the decision of the court of appeals. We also conclude that the amended MPCP does not violate the Establishment Clause or the Wisconsin Constitution.

¶ 3 We are once again asked to review the constitutionality of the Milwaukee Parental Choice Program provided in Wis. Stat. § 119.23 (1995-96).[1] The Wisconsin legislature enacted the original Milwaukee Parental Choice Program (original MPCP) in 1989. *See* 1989 Wis. Act 336. As amended in 1993, the original MPCP permitted up to 1.5 percent of the student membership of the Milwaukee Public Schools (MPS) to attend at no cost to the student any private nonsectarian school located in the City of Milwaukee, subject to certain eligibility requirements.

¶ 4 Under the original MPCP, the legislature limited the students eligible for participation in the original program. To be eligible for the original MPCP, a student (1) had to be a student in kindergarten through twelfth grade; (2) had to be from a family whose income did not exceed 1.75 times the federal poverty level; and (3) had to be either enrolled in a public school in Milwaukee, attending a private school under this program, or not enrolled in school during the previous year. *See* Wis. Stat. § 119.23(2)(a)(1)-(2) (1993-94).

¶ 5 The legislature also placed a variety of qualification and reporting requirements on private schools choosing to participate in the original MPCP. To be eligible to participate in the original MPCP, a private school had to comply with the anti-discrimination provisions imposed by 42 U.S.C. § 2000d[2] and all health and safety laws or

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[1] Unless otherwise stated, all references to Wis. Stats. are to the 1995-96 version of the statutes.

[2] 42 U.S.C. § 2000d provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

codes that apply to Wisconsin public schools. *See id.* at § 119.23(2)(a)(4)-(5). The school additionally had to meet on an annual basis defined performance criteria and had to submit to the State certain financial and performance audits. *See id.* at § 119.23(7), (9).

¶ 6 Under the original MPCP, the State Superintendent of Public Instruction was required to perform a number of supervisory and reporting tasks. The legislature required the State Superintendent to submit an annual report regarding student achievement, attendance, discipline, and parental involvement for students in the program compared to students enrolled in MPS in general. *See id.* at § 119.23(5)(d). The original MPCP further required the State Superintendent to monitor the performance of students participating in the program, and it empowered him or her to conduct one or more financial and performance audits of the program. *See id.* at § 119.23(7)(b), (9)(a).

¶ 7 Under the original MPCP, the State provided public funds directly to participating private schools. For each student attending a private school under the program, the State paid to each participating private school an amount equal to the state aid per student to which MPS would have been entitled under state aid distribution formulas. *See id.* at § 119.23(4). In the 1994-95 school year, this amount was approximately $2,500 per participating student. The amount of state aid MPS received each year was reduced by the amount the State paid to private schools participating in the original program. *See id.* at § 119.23(5)(a).

¶ 8 The original MPCP withstood a number of state constitutional challenges in *Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992). In *Davis*, this court first held that the original program, when enacted, was not a private or local bill and therefore was not subject to the prohibitions of Wis. Const. art. IV, § 18. *See id.* at 537. The court then held that the program did not violate the

uniformity clause in Wis. Const. art. X, § 3 because the private schools did not constitute "district schools" simply by participating in the program. *See id.* at 540. The court finally held that the program, although it applied only to MPS, served a sufficient public purpose and therefore did not violate the public purpose doctrine. *See id.* at 546.

¶ 9 During the 1994-95 school year, approximately 800 students attended approximately 12 nonsectarian private schools under the original program. For the 1995-96 school year, the number of participating students increased to approximately 1,600 and the number of participating nonsectarian private schools increased to 17.

¶ 10 In 1995, as part of the biennial budget bill, the legislature amended in a number of ways the original MPCP. *See* 1995 Wis. Act 27, §§ 4002-4009. First, the legislature removed from Wis. Stat. § 119.23(2)(a) the limitation that participating private schools be "nonsectarian." *See* 1995 Wis. Act 27, § 4002. Second, the legislature increased to 15 percent in the 1996-97 school year the total percentage of MPS membership allowed to participate in the program. *See id.* at § 4003. Third, the legislature deleted the requirement that the State Superintendent conduct annual performance evaluations and report to the legislature, and it eliminated the Superintendent's authority to conduct financial or performance evaluation audits of the program. *See id.* at §§ 4007m and 4008m.

¶ 11 Fourth, the legislature amended the original MPCP so that the State, rather than paying participating schools directly, is required to pay the aid to each participating student's parent or guardian. Under the amended MPCP, the State shall "send the check to the private school," and the parent or guardian shall "restrictively endorse the check for the use of the private school." *Id.* at § 4006m. Fifth, the amended MPCP places an additional limitation on the amount the State will pay to each parent or guardian. Under the amended MPCP, the State

will pay the lesser of the MPS per student state aid under Wis. Stat. § 121.08 or the private school's "operating and debt service cost per pupil that is related to educational programming" as determined by the State. *See id.* The amended MPCP does not restrict the uses to which the private schools can put the state aid. Sixth, the legislature repealed the limitation that no more than 65 percent of a private school's enrollment consist of program participants. *See id.* at § 4003. Finally, the legislature added an "opt-out" provision prohibiting a private school from requiring "a student attending the private school under this section to participate in any religious activity if the pupil's parent or guardian submits to the teacher or the private school's principal a written request that the pupil be exempt from such activities." *Id.* at § 4008e.[3]

¶ 12 The Respondents, Warner Jackson, et al. and Milwaukee Teachers Education Association (MTEA), et al. filed two original actions in August 1995. Together the lawsuits challenged the amended MPCP under the Establishment Clause of the First Amendment; Wis. Const. art. I, § 18; art. X, § 3; art. IV, § 18; and the Wisconsin public purpose doctrine. On August 15, 1996, the National Association for the Advancement of Colored People (NAACP) filed a separate lawsuit, alleging the same claims as the first two lawsuits and adding a claim that, on its face, the amended MPCP violated the Equal Protection Clause of the Fourteenth Amendment and Wis. Const. art. I, § 1. The NAACP then filed a motion to consolidate the lawsuits. The circuit court consolidated the cases, but bifurcated the proceedings so that the equal protection claims would be heard only if the amended MPCP was upheld.

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[3] The expansion of the program was set to commence in the 1995-96 school year. By the time of the injunction, more than 4,000 children previously enrolled in Milwaukee Public Schools (MPS) had applied and over 3,400 had been admitted to private schools under the amended choice program.

¶ 13 The State filed, under Wis. Stat. § (Rule) 809.70, a petition for leave to commence an original action, seeking from this court a declaration that the amended MPCP was constitutional. This court accepted original jurisdiction and entered a preliminary injunction staying the implementation of the amended program, specifying that the pre-1995 provisions of the original program were unaffected. Following oral argument, this court split three-to-three on the constitutional issues, dismissed the petition, and effectively remanded the case to the circuit court for further proceedings. *See State ex rel. Thompson v. Jackson*, 199 Wis. 2d 714, 720, 546 N.W.2d 140 (1996) (per curiam).

¶ 14 Following remand, the circuit court partially lifted the preliminary injunction, thereby allowing the State to implement all of the 1995 amendments except the amendment allowing participation by sectarian private schools. In January 1997, the circuit court granted the Plaintiffs' motions for summary judgment, denied the State's motion for summary judgment, and invalidated the amendments to the MCPC. The circuit court held that the amended MPCP violates the religious benefits and compelled support clauses of Wis. Const. art. I, § 18, the public or local bill prohibitions of Wis. Const. art. IV, § 18, and the public purpose doctrine as the program applied to sectarian schools. The circuit court also found that the amended program did not violate the uniformity clause in Wis. Const. art. X, § 3 or the public purpose doctrine as it applied to the nonsectarian private schools. Because the circuit court invalidated the amended MPCP on state constitutional grounds, the court did not address the question whether the program violates the Establishment Clause. The State appealed from the circuit court's order, and the court of appeals, with Judge Roggensack dissenting, affirmed.

¶ 15 A majority of the court of appeals held that the amended MPCP violates the prohibition against state ex-

penditures for the benefit of religious societies or seminaries contained in Wis. Const. art. I, § 18. The court of appeals, therefore, struck the amended MPCP in its entirety and found it unnecessary to reach the other state and the federal constitutional issues. The State appealed to this court, and we granted the State's petition for review.

¶ 16 In the circuit court, the Respondents challenged the amended MPCP under the Establishment Clause of the First Amendment; Wis. Const. art. I, § 18; art. X, § 3; art. IV, § 18; and the Wisconsin public purpose doctrine. We address each issue in turn.

¶ 17 Before we begin our analysis of the amended MPCP, we pause to clarify the issues not before this court. In their briefs and at oral argument, the parties presented information and testimony expressing positions pro and con bearing on the merits of this type of school choice program. This debate largely concerns the wisdom of the amended MPCP, its efficiency from an educational point of view, and the political considerations which motivated its adoption. We do not stop to summarize these arguments, nor to burden this opinion with an analysis of them, for they involve considerations not germane to the narrow constitutional issues presented in this case. In the absence of a constitutional violation, the desirability and efficacy of school choice are matters to be resolved through the political process. This program may be wise or unwise, provident or improvident from an educational or public policy viewpoint. Our individual preferences, however, are not the constitutional standard.

Standard of Review

¶ 18 Procedurally, this case is before the court pursuant to the circuit court's grant of summary judgment to the Plaintiffs-Respondents. We independently review a grant of summary judgment, *see Burkes v. Klauser*, 185 Wis. 2d 308, 327, 517 N.W.2d 503 (1994), applying the same methodology as that used by the circuit court. *See*,

e.g., Kafka v. Pope, 194 Wis. 2d 234, 240, 533 N.W.2d 491 (1995); *Voss v. City of Middleton,* 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991). A motion for summary judgment must be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Wis. Stat. § 802.08(2). The underlying issue in this case is the constitutionality of the amended MPCP. The constitutionality of a statute is a question of law which we review independently, without giving deference to the decisions of the circuit court and the court of appeals. *See State v. Post,* 197 Wis. 2d 279, 301, 541 N.W.2d 115 (1995); *State v. Migliorino,* 150 Wis. 2d 513, 524, 442 N.W.2d 36 (1989).

¶ 19 Like any other duly enacted statute, the amended MPCP enjoys a strong presumption of constitutionality. All legislative acts are presumed constitutional, and every presumption must be indulged to sustain the law. *See State v. Randall,* 192 Wis. 2d 800, 824, 532 N.W.2d 94 (1995); *State ex rel. Hammermill Paper Co. v. La Plante,* 58 Wis. 2d 32, 47, 205 N.W.2d 784 (1973). Accordingly, "[it] is not enough that respondent[s] establish doubt as to act's constitutionality nor is it sufficient that respondent[s] establish the unconstitutionality of the act as a probability. Unconstitutionality of the act must be demonstrated beyond a reasonable doubt." *La Plante,* 58 Wis. 2d at 46; *see also State v. McManus,* 152 Wis. 2d 113, 129, 447 N.W.2d 654 (1989); *Quinn v. Town of Dodgeville,* 122 Wis. 2d 570, 577, 364 N.W.2d 149 (1985).

I. Establishment Clause

¶ 20 The first issue we address is whether the amended MPCP violates the Establishment Clause of the First Amendment to the United States Constitution. Neither the circuit court nor the court of appeals reached this issue. Upon review we conclude that the amended MPCP does not violate the Establishment Clause because it has a secular purpose, it will not have the primary effect of advancing religion, and it will not lead to excessive en-

tanglement between the State and participating sectarian private schools.[4]

¶ 21 The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This mandate applies equally to state legislatures by virtue of the Due Process Clause of the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Holy Trinity Community Sch. v. Kahl*, 82 Wis. 2d 139, 150, 262 N.W.2d 210 (1978). The Establishment Clause, therefore, prohibits state governments from passing laws which have either the purpose or effect of advancing or inhibiting religion. *See Agostini v. Felton*, —— U.S. ——, 117 S. Ct. 1997, 2010 (1997).

¶ 22 When assessing any First Amendment challenge to a state statute, we are bound by the results and inter-

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[4] Citing the United States Supreme Court's decision in *United States v. Salerno*, 481 U.S. 739 (1987), the Petitioners argue that since the Respondents challenge the amended Milwaukee Parental Choice Program (MPCP) as facially unconstitutional, as opposed to unconstitutional as applied to a set of particular facts, the Respondents' federal claims must fail unless they can show that under all circumstances the amended MPCP is unconstitutionl. In *Salerno*, the Court noted that to succeed with a facial challenge, a party must "establish that no set of circumstances exists under which the [statute] would be valid." *Id.* at 745. The Court has not directly held that the *Salerno* standard applies to facial challenges raised under the Establishment Clause. Nor has the Court consistently applied the *Salerno* standard in other contexts. *See Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175-76 n.1 (1996) (Mem.) (citing cases in which Court did not apply *Salerno* language). In *Bowen v. Kendrick*, 487 U.S. 589 (1988), decided just one year after *Salerno*, the Court considered a facial challenge to the Adolescent Family Life Act under the Establishment Clause. Although it upheld the federal program, the *Bowen* Court did not cite to or apply the "no set of circumstances" language from *Salerno*. *See id.* at 627 n.1 (Blackmun, J., dissenting). We decline to apply the *Salerno* standard here. We leave to the Court the decision whether to apply the *Salerno* standard to facial challenges raised under the Establishment Clause.

pretations given that amendment by the decisions of the United States Supreme Court. *See State ex rel. Holt v. Thompson,* 66 Wis. 2d 659, 663, 225 N.W.2d 678 (1975). "Ours [is] not to reason why; ours [is] but to review and apply." *State ex rel. Warren v. Nusbaum, (Nusbaum I)*, 55 Wis. 2d 316, 322, 198 N.W.2d 650 (1972). Our limited role is not aided by the Supreme Court's candid admission that in applying the Establishment Clause, it has "sacrifice[d] clarity and predictability for flexibility." *Committee for Pub. Educ. and Religious Liberty v. Regan,* 444 U.S. 646, 662 (1980).

¶ 23 The Supreme Court has repeatedly recognized that the Establishment Clause raises difficult issues of interpretation, and cases arising under it "have presented some of the most perplexing questions to come before [the] Court." *Committee for Pub. Educ. and Religious Liberty v. Nyquist,* 413 U.S. 756, 760 (1973); *see, e.g., Mueller v. Allen,* 463 U.S. 388, 392 (1983); *Lemon v. Kurtzman,* 403 U.S. 602, 612 (1971). We are therefore cognizant of the Court's warnings that:

> There are always risks in treating criteria discussed by the Court from time to time as 'tests' in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics . . . [C]andor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.

Tilton v. Richardson, 403 U.S. 672, 678 (1971); *see also Mueller,* 463 U.S. at 393; *Lemon,* 403 U.S. at 612.

¶ 24 In an attempt to focus on the three main evils from which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity, *see Walz v. Tax Commission,* 397 U.S. 664, 668 (1970), the Court has promulgated a three-pronged test to deter-

mine whether a statute complies with the Establishment Clause. *See Lemon*, 403 U.S. at 612. Under this test, a statute does not violate the Establishment Clause if (1) it has a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not create excessive entanglement between government and religion. *See id.* at 612-13. We must apply this three-part test to determine the constitutionality of Wis. Stat. § 119.23.[5]

a. First Prong—Secular Purpose

¶ 25 Under the first prong of the *Lemon* test, we examine whether the purpose of the state legislation is secular in nature. Our analysis of the amended MPCP under this prong of the *Lemon* test is straightforward. Courts have been "reluctan[t] to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller*, 463 U.S. at 394-95.

¶ 26 As the court of appeals recognized, the secular purpose of the amended MPCP, as in many Establishment Clause cases, is virtually conceded. *See Jackson*, 213 Wis. 2d at 29. The purpose of the program is to provide low-income parents with an opportunity to have their children

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[5] While the continued authority of the test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is uncertain, we have no choice but to apply it in this case. We recognize that five current United States Supreme Court Justices have questioned the continued use of the *Lemon* test. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). Until a majority of the Supreme Court directly holds otherwise, however, we continue to apply the *Lemon* test. *See Agostini v. Felton*, —— U.S. ——, 117 S. Ct. 1997, 2017 (1997) (stating that other courts should leave to the Supreme Court "the prerogative of overruling its own decisions."). Unlike the Supreme Court, we cannot command this "ghoul" to return to its tomb when we wish it to do so. *See Lamb's Chapel*, 508 U.S. at 398-99 (Scalia, J., concurring).

educated outside of the embattled Milwaukee Public School system. The propriety of providing educational opportunities for children of poor families in the state goes without question:

> A State's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well-educated.

Mueller, 463 U.S. at 395. The propriety of such legislative purpose, however, does not immunize the amended MPCP from further constitutional challenge. *See Nyquist*, 413 U.S. at 773-74. If the amended MPCP either has a primary effect that advances religion or if it fosters excessive entanglements between church and state, then the program is constitutionally infirm and must be struck down. *See id.* at 774.

b. Second Prong—Primary Effect of Edvancing Religion

¶ 27 Analysis of the amended program under the second prong of the *Lemon* test is more difficult. While the first prong of *Lemon* examines the legislative purpose of the challenged statute, the second prong focuses on its likely effect. A law violates the Establishment Clause if its principal or primary effect either advances or inhibits religion. *See Lemon*, 403 U.S. at 612; *see also Agostini*, 117 S. Ct. at 2010; *Mueller*, 463 U.S. at 396.

¶ 28 This does not mean that the Establishment Clause is violated every time money previously in the possession of a state is conveyed to a religious institution. *See Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 486 (1986). "The simplistic argument

that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago . . . ." *Tilton*, 403 U.S. at 679; *see Nusbaum I*, 55 Wis. 2d at 321 n.4. The constitutional standard is the separation of church and state. *See Zorach v. Clauson* 343 U.S. 306, 314 (1952). "The problem, like many problems in constitutional law, is one of degree." *Id.*

¶ 29 We begin our analysis under the second prong of the *Lemon* test by first considering the cumulative criteria developed over the years and applying to a wide range of educational assistance programs challenged as violative of the Establishment Clause. *See Tilton*, 403 U.S. at 677-78. Although the lines with which the Court has sketched the broad contours of this inquiry are fine and not absolutely straight, the Court's decisions generally can be distilled to establish an underlying theory based on neutrality [6] and indirection: [7] state programs that are

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[6] The Supreme Court has historically looked to whether a program is neutral toward religion in defining its beneficiaries. *See, e.g., Bowen*, 487 U.S. 589 (rejecting challenge to federal program neutrally providing public funds to sectarian or purely secular institutions for services relating to adolescent sexuality and pregnancy to institutions); *Roemer v. Maryland Bd. of Public Works*, 426 U.S. 736 (1976) (upholding Maryland statute that provided annual subsidies directly to qualifying colleges and universities in the state, including religiously affiliated institutions; *Hunt v. McNair*, 413 U.S. 734 (1973) (rejecting challenge to South Carolina statute providing certain benefits to all institutions of higher education in South Carolina, whether or not having a religious affiliation); *Tilton v. Richardson*, 403 U.S. 672 (1971) (approving Federal Higher Educational Facilities Act, providing grants to "all colleges and universities regardless of any affiliation with or sponsorship by a religious body); *Board of Education v. Allen*, 392 U.S. 236 (1968) (upholding state provision of secular textbooks for both public and private schools); *Everson v. Board of Education*, 330 U.S. 1 (1947) (approving busing services equally available to both public and private school children).

[7] The Court has also focused on whether public aid that flows to religious institutions does so only as a result of "genuinely inde-

wholly neutral in offering educational assistance directly to citizens in a class defined without reference to religion do not have the primary effect of advancing religion. The Court has explained:

> Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993).

¶ 30 The Court's general principle under the Establishment Clause has, since its decision in *Everson*, been one of neutrality and indirection.[8] Writing for the majority in *Everson*, Justice Black set out the view of the Establishment Clause that still guides the Court's think-

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pendent and private choices of the aid recipients." *Witters v. Washington Dep't of Services for Blind*, 474 U.S. 481, 487 (1986); *see, e.g., Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 842-43 (1995); *Mueller v. Allen*, 463 U.S. 388, 398 (1983); *Allen*, 392 U.S. at 243-44; *Everson*, 330 U.S. at 17-18.

[8] The concept of neutrality has developed as a necessary result of the interplay between the Establishment and Free Exercise Clauses of the First Amendment, "both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would clash with the other." *Walz v. Tax Commission*, 397 U.S. 664, 668-69 (1970). The Court in *Walz* explained:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Id. at 669.

ing today. The *Everson* Court explained that "the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" Everson, 330 U.S. at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)). The Court tempered its statement, however, by cautioning that in maintaining this wall of separation, courts must "be sure that [they] do not inadvertently prohibit [the government] from extending its general State law benefits to all its citizens without regard to their religious belief." *Id.* at 16. Under this reasoning, the Court held that the Establishment Clause does not prohibit New Jersey from spending tax-raised funds to reimburse parents directly for the bus fares of parochial school pupils as a part of a general program under which the State pays the fares of pupils attending public and other schools. *See id.* at 17.

¶ 31 In *Nyquist*, the Court struck down on Establishment Clause grounds a New York program that, *inter alia*, provided tuition grants to parents of children attending private schools. Under the program, New York sought to assure that participating parents would continue to send their children to religion-oriented schools by relieving their financial burdens. *See Nyquist*, 413 U.S. at 783. Before striking the tuition grants, the Court distinguished on two grounds the New York statute from the New Jersey statute reviewed in *Everson*: (1) unlike the statute in *Everson*, the New York statute was non-neutral because it provided benefits solely to private schools and parents with children in private schools, *see id.* at 782 n.38; and (2) the New York statute provided financial assistance rather than bus rides, *see id.* at 781-82. The Court concluded that the fact that aid was distributed directly to parents rather than the schools, although a factor in its analysis, did not save the statute because the effect of New York's program was "unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783.

¶ 32 Significant to the case now before us, however, the Court in *Nyquist* specifically reserved the issue whether an educational assistance program that was both neutral and indirect would survive an Establishment Clause challenge:

> Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.

Id. at 782 n.38. In cases following its decision in *Nyquist,* the Court has piecemeal answered this question as it has arisen in varying fact situations. *See, e.g., Mueller,* 463 U.S. 388; *Witters,* 474 U.S. 481; *Zobrest,* 509 U.S. 1; *Rosenberger v. Rector and Visitors of Univ. of Virginia,* 515 U.S. 819; Agostini, 117 S. Ct. 1997.[9]

¶ 33 In *Mueller,* the Court rejected an Establishment Clause challenge to a Minnesota statute allowing taxpayers to deduct certain educational expenses in computing

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[9] We reject the Respondents' argument that this case is controlled by *Committee for Pub. Educ. and Religious Liberty v. Nyquist,* 413 U.S. 756 (1973). Although the tuition reimbursement program in *Nyquist* closely parallels the amended MPCP, there are significant distinctions. In *Nyquist,* each of the facets of the challenged program directed aid exclusively to private schools and their students. The MPCP, by contrast, provides a neutral benefit to qualifying parents of school-age children in Milwaukee Public Schools. Unlike the program in *Nyquist,* the only financially-qualified Milwaukee students excluded from participation in the amended MPCP are those in the fourth grade or higher who are already attending private schools. The amended MPCP, viewed in its surrounding context, merely adds religious schools to a range of pre-existing educational choices available to MPS children. This seminal fact takes the amended MPCP out of the *Nyquist* construct and places it within the framework of neutral education assistance programs.

their state income tax, even though a majority of those deductions went to parents whose children attended sectarian schools. *See Mueller*, 463 U.S. at 401-02. "Two factors, aside from the States' traditionally broad taxing authority, informed [the *Mueller* Court's] decision." *Zobrest*, 509 U.S. at 9. First, the Court noted that, unlike the statute in *Nyquist*, the Minnesota law "permits all parents—whether their children attend public school or private—to deduct their children's educational expenses." *Mueller*, 436 U.S. at 398. Second, the Court emphasized that under Minnesota's tax deduction scheme, public funds become available to sectarian schools "only as a result of numerous private choices of individual parents of school-age children," thus distinguishing *Mueller* from other cases involving "the direct transmission of assistance from the state to the schools themselves." *Id.* at 399. The Court concluded:

> The historic purposes of the clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.

Id. at 400. *Mueller* makes clear that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the [*Lemon*] test, because any aid to religion results from the private choices of individual beneficiaries." *Witters*, 474 U.S. at 490-91 (Powell, J. concurring) (footnote and citations omitted).[10]

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[10] As to its discussion of the importance of *Mueller*, 463 U.S. 388, in Establishment Clause jurisprudence, Justice Powell's concurring opinion in *Witters*, 474 U.S. at 490-91, drew the support of five members of the Court. Chief Justice Burger and Justice Rehnquist joined Justice Powell's concurrence, while Justices White and O'Connor wrote separately, but agreed with Justice Powell's

¶ 34 The Court reaffirmed the dual importance of neutrality and indirect aid in *Witters*. *See Witters*, 474 U.S. 481. In *Witters*, the Court *unanimously* held that the Establishment Clause did not bar a state from issuing a vocational tuition grant to a blind person who intended to use the grant to attend a Christian college and become a pastor, missionary, or youth director.[11] The Court focused first on the program's indirect aid, finding that because the aid was paid to the student rather than the institution "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of genuinely independent and private choices of aid recipients." *Id.* at 487.

¶ 35 As in *Mueller*, the *Witters* Court then emphasized the neutrality of the program, finding that "Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,' " and therefore "creates no financial incentive for students to undertake sectarian education." *Id.* at 487-88 (quoting *Nyquist*, 413 U.S. at 782-83 n.38). In light of these factors,[12] the Court held that

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opinion with respect to the relevance of *Mueller*. *See Witters*, 474 U.S. at 490 (White, J. concurring); *id.* at 493 (O'Connor, J. concurring).

11 On its face, the Washington educational aid program upheld in *Witters* was in all significant aspects similar to the amended MPCP. The public aid was in the form of tuition grants and was made available to disadvantaged students generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited, *see Witters*, 474 U.S. at 488; student eligibility for the aid was based on nonsectarian criteria, *see id.* at 482 n.2, and the aid was paid directly to the student who then could transmit it to the school of his or her choice, *see id.* at 488.

12 The Court in *Witters* further distinguished the Washington program from the tuition grants in *Nyquist* by noting that in application no "significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education." *Witters*, 474 U.S. at 488. The Court's consideration of the

Washington's program—even as applied to a student who sought state assistance so that he could become a pastor—would not advance religion in a manner inconsistent with the Establishment Clause.[13] *See id.* at 489.

¶ 36 The Supreme Court applied the same logic in *Zobrest*, where it held that the Establishment Clause did not prohibit a school district from providing to a deaf student a sign-language interpreter under the Individuals with Disabiliites Education Act (IDEA), even though the interpreter would be a mouthpiece for religious instruction. *See Zobrest*, 509 U.S. at 13-14. The *Zobrest* Court, basing its reasoning upon *Mueller* and *Witters*, again looked to neutrality and indirection as its guiding principles. Specifically focusing on the general availability of the statute, the Court found that the "service at issue in this case is part of a general government program that distributes benefits neutrally to any child . . . without regard to the . . . 'nature' of the school the child attends." *Id.* at 10.

¶ 37 The *Zobrest* Court then looked to whether the aid was direct or indirect, explaining that "[b]y according

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percentage of students who would likely transmit program aid to sectarian institutions is inconsistent with its prior decision in *Mueller*, where the Court specifically rejected any statistical analysis showing that in application parents of children in sectarian private schools would take the bulk of the benefits available under the program. *See Mueller*, 463 U.S. at 401. The *Mueller* Court explained: "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Id.* The Court recently reaffirmed the position it took in *Mueller*. *See Agostini*, 117 S. Ct. at 2013.

[13] In *Witters*, the Court limited its analysis to the first two prongs of the *Lemon* test. The Court held that the Washington program had a secular purpose and that it did not have the primary effect of advancing religion. *See Witters*, 474 U.S. at 485-86, 488-89. The Court declined to address the entanglement issue and remanded the case for further analysis. *See id.* at 489 n.5, 490.

parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as result of the private decision of individual parents." *Id.* Based on these two findings, the Court concluded: "When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,' it follows under our prior decisions that provision of that service does not offend the Establishment Clause." *Id.* (quoting *Witters*, 474 U.S. at 488).

¶ 38 In *Rosenberger*, the Supreme Court held that the Establishment Clause did not prohibit the university from funding a student organization, which otherwise would have been entitled to publication funds, merely because it published a newspaper with a Christian point of view. The Court clarified that the critical aspect of the analysis was whether the state conferred a benefit which neither inhibited nor promoted religion. *See Rosenberger*, 515 U.S. at 839. As long as the benefit was neutral with respect to religion, what the student did with that benefit, even if it was to spend all of it on religion-related expenditures, was irrelevant for purposes of analyzing whether the law or policy violated the Establishment Clause. *Id.* at 842-43.

¶ 39 Finally, in *Agostini*, the Supreme Court held that a federally funded program providing supplemental, remedial instruction on a neutral basis to disadvantaged children at sectarian schools is not invalid under the Establishment Clause when sufficient safeguards exist.[14]

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[14] Unlike the amended MPCP, the education assistance program reviewed in *Agostini* was federally funded under Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 et seq. *See Agostini*, 117 S. Ct. at 2003. The program, however, was designed and implemented by a local educational agency, the Board of Education of the City of New York. *See id.* at 2003-05. Although New York City's Title I program was federally funded,

See Agostini, 117 S. Ct. at 2016. The Court explained that while the general principles used to evaluate Establishment Clause cases have remained unchanged, the Court's "understanding of the criteria used to assess" the inquiry has changed in recent years. *Id.* at 2010.[15] The Court reiterated that the unchanged principle under the Establishment Clause remains neutrality, and that the Court will continue to ask whether the government acts with the purpose or effect of advancing or inhibiting religion. *See id.* Writing for the Court, Justice O'Connor set out three criteria the Court has in recent years used to evaluate whether an impermissible effect exists. The aid must "not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* at 2016.

¶ 40 After considering these three criteria, the Court held that the program did not have the primary effect of advancing religion. The Court first concluded that placing full-time employees on parochial school campuses under this program did not result in advancing religion through indoctrination. *See id.* at 2014. The Court then considered whether the criteria by which the program identified beneficiaries created a financial incentive to undertake religious indoctrination. The Court, synthesizing the central establishment clause principle, concluded that no such incentive existed under the program: "[t]his incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.*

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we find the *Agostini* Court's analysis of that program relevant to our review of the State funded amended MPCP.

[15] In upholding New York City's Title I program, the Supreme Court in *Agostini* directly overruled its decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), as well as a portion of its decision in *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

The Court also concluded that the federal program did not result in an excessive entanglement between church and state. *See id.* at 2015-16.

¶ 41 The Supreme Court, in cases culminating in *Agostini,* has established the general principle that state educational assistance programs do not have the primary effect of advancing religion if those programs provide public aid to both sectarian and nonsectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age children. The amended MPCP is precisely such a program. Applying to the amended MPCP the criteria the Court has developed from *Everson* to *Agostini,* we conclude that the program does not have the primary effect of advancing religion.

¶ 42 First, eligibility for benefits under the amended MPCP is determined by "neutral, secular criteria that neither favor nor disfavor religion," and aid "is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini,* 117 S. Ct. at 2014. Pupils are eligible under the amended MPCP if they reside in Milwaukee, attend public schools (or private schools in grades K-3) and meet certain income requirements. Beneficiaries are then selected on a random basis from all those pupils who apply and meet these religious-neutral criteria. Participating private schools are also selected on a religious-neutral basis and may be sectarian or nonsectarian. The participating private schools must select on a random basis the students attending their schools under the amended program, except that they may give preference to siblings already accepted in the schools. In addition, under the new "opt-out" provision, the private schools cannot require the students participating in the program to participate in any religious activity provided at that school.

¶ 43 Under the amended MPCP, beneficiaries are eligible for an equal share of per pupil public aid regardless of the school they choose to attend. To those eligible pupils and parents who participate, the amended MPCP provides a religious-neutral benefit—the opportunity "to choose the educational opportunities that they deem best for their children." *Davis*, 166 Wis. 2d at 532. The amended MPCP, in conjunction with existing state educational programs, gives participating parents the choice to send their children to a neighborhood public school, a different public school within the district, a specialized public school, a private nonsectarian school, or a private sectarian school.[16] As a result, the amended program is in no way "skewed towards religion." *Mitters*, 474 U.S. at 488.

¶ 44 The amended MPCP therefore satisfies the principle of neutrality required by the Establishment Clause. As Justice Jackson explained in *Everson*:

> A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he . . . is a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman

[16] Our inquiry into the constitutionality of the amended MPCP must encompass "the nature and consequences of the program viewed as a whole." *Witters*, 474 U.S. at 492 (Powell, J., concurring). According to the stipulated facts in this case, the State's system of per-pupil school financing, in which public funds follow each child, now encompasses a wide range of school choices—mainly public, but some private or religious. Numerous programs have amended the number and type of educational options available to public school students. Qualifying public school students may choose from among the Milwaukee public district schools, magnet schools, charter schools, suburban public schools, trade schools, schools developed for students with exceptional needs, and now sectarian or nonsectarian private schools participating in the amended MPCP. In each case, the programs let state funds follow students to the districts and schools their parents have chosen.

> has to ask before he renders aid 'Is this man or building identified with the Catholic Church.'

Everson, 330 U.S. at 25 (Jackson, J., dissenting). The amended MPSP works in much the same way. A student qualifies for benefits under the amended MPCP not because he or she is a Catholic, a Jew, a Moslem, or an atheist; it is because he or she is from a poor family and is a student in the embattled Milwaukee Public Schools. To qualify under the amended MPCP, the student is never asked his or her religious affiliation or beliefs; nor is he or she asked whether the aid will be used at a sectarian or nonsectarian private school. Because it provides a neutral benefit to beneficiaries selected on religious-neutral criteria, the amended MPCP neither leads to "religious indoctrination," *Agostini*, 117 S. Ct. at 2014, nor "creates [a] financial incentive for students to undertake sectarian education." *Witters*, 474 U.S. at 488; *Zobrest*, 509 U.S. at 10. As Judge Roggensack concluded, "[t]he benefit neither promotes religion nor is hostile to it. Rather, it promotes the opportunity for increased learning by those currently having the greatest difficulty with educational achievement." *Jackson*, 213 Wis. 2d at 61.

¶ 45 Second, under the amended MPSP public aid flows to sectarian private schools only as a result of numerous private choices of the individual parents of school-age children. Under the original MPCP, the State paid grants directly to participating private schools. As explained above, the program was amended so that the State will now provide the aid by individual checks made payable to the parents of each pupil attending a private school under the program. Each check is sent to the parents' choice of schools and can be cashed only for the cost of the student's tuition. Any aid provided under the amended MPCP that ultimately flows to sectarian private schools, therefore, does so "only as a result of genuinely independent and private choices of aid recipients." *Witters*, 474 U.S. at 487.

¶ 46 We recognize that under the amended MPCP the State sends the checks directly to the participating private school and the parents must restrictively endorse the checks to the private schools. Nevertheless, we do not view these precautionary provisions as amounting to some type of "sham" to funnel public funds to sectarian private schools. In our assessment, the importance of our inquiry here is not to ascertain the path upon which public funds travel under the amended program, but rather to determine who ultimately chooses that path. As with the programs in *Mueller* and *Witters*, not one cent flows from the State to a sectarian private school under the amended MPCP except as a result of the necessary and intervening choices of individual parents. As a result, "[n]o reasonable observer is likely to draw from [these facts] an inference that the State itself is endorsing a religious practice or belief." *Witters*, 474 U.S. at 493 (O'Connor, J., concurring); *see also Zobrest*, 509 U.S. at 9-10.

¶ 47 The amended MPCP, therefore, places on equal footing options of public and private school choice, and vests power in the hands of parents to choose where to direct the funds allocated for their children's benefit. We are satisfied that the implementation of the provisions of the amended MPCP will not have the primary effect of advancing religion.[17]

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[17] The Respondents also argue that the amended MPCP has the primary effect of advancing religion because a substantial percent of the program's aid will flow to sectarian schools. They point out that of the 122 private schools eligible to participate in the amended program 89 are sectarian. We find this argument unpersuasive. The Supreme Court has warned against "focusing on the money that is undoubtedly expended by the government rather than on the nature of the benefit received by the recipient." *Rosenberger*, 515 U.S. at 843. "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller*, 463 U.S. at 401. The percent of program funds eventually paid to sectarian private schools is irrelevant to our inquiry.

c. Third Prong—Excessive Government Entanglement

¶ 48 The final question for us to determine under the *Lemon* test is whether the amended MPCP would result in an excessive governmental entanglement with religion.[18] Stated another way, it is necessary to determine whether "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions [against the inculcation of religious tenets] are obeyed and the First Amendment otherwise respected." *Lemon*, 403 U.S. at 619.

¶ 49 Not all entanglements have the effect of advancing or inhibiting religion. The Court's prior holdings illustrate that total separation between church and state is not possible in an absolute sense. "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon*, 403 U.S. at 614. Some relationship between the State and religious organizations is inevitable. *See id.* (citing *Zorach*, 343 U.S. at 312). "Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." *See Agostini*, 117 S. Ct. at 2015.

¶ 50 The amended MPCP will not create an excessive entanglement between the State and religion. Under the amended program, the State need not, and in fact is not given the authority to impose a "comprehensive, discriminating, and continuing state surveillance" over the participating sectarian private schools. *Lemon*, 403 U.S. at 619. Participating private schools are subject to perform-

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[18] The United States Supreme Court has considered entanglement both in the course of assessing whether an aid program has an impermissible effect of advancing religion and as an independent factor under the *Lemon* test. *See Agostini*, 117 S. Ct. at 2015. Regardless of how the Court has characterized the analysis, whether a government aid program results in such entanglement has consistently been an aspect of its Establishment Clause analysis. *See id.*

ance, reporting, and auditing requirements, as well as to applicable nondiscrimination, health, and safety obligations. Enforcement of these minimal standards will require the State Superintendent to monitor the quality of secular education at the sectarian schools participating in the plan. But this oversight already exists. In the course of his existing duties, the Superintendent currently monitors the quality of education at all sectarian private schools.

¶ 51 These oversight activities relating to conformity with existing law do no create excessive entanglement merely because they are part of the amended MPCP's requirements. *See, e.g., Mueller,* 463 U.S. at 403. As the Court held in *Hernandez v. Commissioner,* 490 U.S. 680, 696-97 (1989):

> [R]outine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no 'detailed monitoring and close administrative contact' between secular and religious bodies, does not of itself violate the nonentanglement command.

(citation omitted); *accord, Agostini,* 117 S.Ct. at 2014-16; *Board of Educ. of the Westside Community Sch. v. Mergens,* 496 U.S. 226, 253 (1990); *Hartmann v. Stone,* 68 F.3d 973 (6th Cir. 1995). The program does not involve the State in any way with the schools' governance, curriculum, or day-to-day affairs. The State's regulation of participating private schools, while designed to ensure that the program's educational purposes are fulfilled, does not approach the level of constitutionally impermissible involvement.

¶ 52 In short, we hold that the amended MPCP, which provides a neutral benefit directly to children of economically disadvantaged families on a religious-neutral basis, does not run afoul of any of the three primary criteria the Court has traditionally used to evaluate whether a state educational assistance program has the

purpose or effect of advancing religion. Since the amended MPCP has a secular purpose, does not have the primary effect of advancing religion, and does not create an excessive entanglement, it is not invalid under the Establishment Clause.[19]

II State Establishment Clause

¶ 53 The next question presented in this case is whether the amended MPCP violates art. I, § 18 of the Wisconsin Constitution.[20] The Respondents argue, and the court of appeals concluded, that the amended MPCP violates both the "benefits clause" and the "compelled support clause" of art. 1, § 18. Upon review, we conclude that the amended MPCP violates neither provision.

¶ 54 The "benefits clause" of art. I, § 18 provides: "nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." This is Wisconsin's equivalent of the Establishment Clause of the First Amendment. *See King v. Village of Waunakee,* 185 Wis. 2d 25, 52, 517 N.W.2d 671 (1994); *Holt,* 66 Wis. 2d at 676. This court has remarked that the language of art. I, § 18, while "more specific than the terser" clauses of the First Amendment, carries the same import, *Holt,* 66 Wis. 2d at 676; both

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19 Since we conclude that the amended MPCP does not violate the Establishment Clause, we need not address the issue, raised by Petitioners Marquelle Miller, et al., whether excluding sectarian private schools from the program violates the Free Exercise Clause of the First Amendment.

20 Wis. Const. art. I, § 18 provides as follows:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishment or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

provisions "are intended and operate to serve the same dual purpose of prohibiting the 'establishment' of religion and protecting the 'free exercise' of religion." *See State ex rel. Warren v. Nusbaum* (*Nusbaum II*), 64 Wis. 2d 314, 327-28, 219 N.W.2d 577 (1974) (quoting *Nusbaum I*, 55 Wis. 2d at 332). Although art. I, § 18 is not subsumed by the First Amendment, *see State v. Miller*, 202 Wis. 2d 56, 63, 549 N.W.2d 235 (1996), we interpret and apply the benefits clause of art. I, § 18 in light of the United States Supreme Court cases interpreting the Establishment Clause of the First Amendment. *See King*, 185 Wis. 2d at 55; *American Motors Corp. v. DILHR*, 93 Wis. 2d 14, 29, 286 N.W.2d 847 (1979); *State ex rel. Wisconsin Health Facilities Auth. v. Lindner*, 91 Wis. 2d 145, 163-64, 280 N.W.2d 773 (1979).[21]

¶ 55 Unlike the court of appeals, which focused on whether sectarian private schools were "religious seminaries" under art. I, § 18, we focus our inquiry on whether the aid provided by the amended MPCP is "for the benefit

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[21] Citing our decision in *State v. Miller*, 202 Wis. 2d 56, 549 N.W.2d 235 (1996), the Respondents assert that we are precluded from looking to federal establishment clause jurisprudence in analyzing the amended MPCP under the "benefits clause" of Wis. Const. art. I, § 18. We disagree. In *Miller*, we correctly stated that some questions arising under art. I, § 18 "cannot be fully illuminated by the light of federal jurisprudence alone, but may require examination according to the dictates of the more expansive protections envisioned by our state constitution." *Id.* at 64. In *Miller*, however, we interpreted and applied the "freedom of conscience" clause, and not the benefits clause, of art. I, § 18. *See id.* at 63, 65-66. This court has traditionally looked to federal establishment clause jurisprudence, and in particular the primary effects test, when interpreting the "for the benefit of" language in the benefits clause of art. I, § 18. *See, e.g., King v. Village of Waunakee*, 185 Wis. 2d 25, 51, 517 N.W.2d 671 (1994); *State ex rel. Wisconsin Health Facilities Auth. v. Lindner*, 91 Wis. 2d 145, 163-64, 280 N.W.2d 773 (1979); *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316, 333, 198 N.W.2d 650 (1972) *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 227, 170 N.W.2d 790 (1969). We continue to do so in this case.

of" such religious institutions.[22] We have explained that the language "for the benefit of" in art. I, § 18 "is not to be read as requiring that some shadow of incidental benefit to a church-related institution brings a state grant or contract to purchase within the prohibition of the section." *Nusbaum I*, 55 Wis. 2d at 333. Furthermore, we have stated that the language of art. I, § 18 cannot be read as being "so prohibitive as not to encompass the primary-effect test." *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 227, 170 N.W.2d 790 (1969). The crucial question, under art. I, § 18, as under the Establishment Clause, is "not whether some benefit accrues to a religious institution as a consequence of the legislative progam, but whether its principal or primary effect advances religion." *Nusbaum I*, 55 Wis. 2d at 333 (quoting *Tilton*, 403 U.S. at 679).

¶ 56 Applying the primary effect test developed by the Supreme Court, we have concluded above that the primary effect of the amended MPCP is not the advancement of a religion. We find the Supreme Court's primary effect test, focusing on the neutrality and indirection of state aid, is well reasoned and provides the appropriate line of demarcation for considering the constitutionality of neutral educational assistance programs such as the amended MPCP. Since the amended MPCP does not transgress the primary effect test employed in Establishment Clause jurisprudence, we also conclude that the statute is constitutionally inviolate under the benefits clause of art. I, § 18.

¶ 57 This conclusion is not inconsistent with Wisconsin tradition or with past precedent of this court.

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[22] This court has construed "religious societies" to be synonymous with religious organizations. At the time of the adoption of our constitution in 1848, the word "seminaries" was synonymous with academies or schools. *See State ex rel. Weiss v. District Board*, 76 Wis. 177, 215, 44 N.W. 967 (1890). Sectarian private schools, therefore, constitute "religious seminaries" within the meaning of art. I, § 18. *See State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 156, 115 N.W.2d 761 (1962).

Wisconsin has traditionally accorded parents the primary role in decisions regarding the education and upbringing of their children. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Wisconsin Indus. Sch. for Girls v. Clark County*, 103 Wis. 651, 79 N.W.2d 422 (1899); *accord Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). This court has embraced this principle for nearly a century, recognizing that: "parents as the natural guardians of their children [are] the persons under natural conditions having the most effective motives and inclinations and being in the best position and under the strongest obligations to give to such children proper nurture, education, and training." *Wisconsin Indus. Sch. for Girls*, 103 Wis. at 668-69.

¶ 58 In this context, this court has held that public funds may be placed at the disposal of third parties so long as the program on its face is neutral between sectarian and nonsectarian alternatives and the transmission of funds is guided by the independent decisions of third parties, *see, e.g., State ex rel. Atwood v. Johnson*, 170 Wis. 218, 175 N.W.2d 589 (1919), and that public funds generally may be provided to sectarian educational institutions so long as steps are taken not to subsidize religious functions, *see, e.g., Nusbaum II*, 64 Wis. 2d 314.

¶ 59 In *Nusbaum II*, this court upheld a state program that provided educational benefits without charge to students with exceptional educational needs. Where public resources were inadequate to attend to a student's exceptional needs, the State could under the program directly contract with private sectarian institutions to provide the necessary services. *See Nusbaum II*, 64 Wis. 2d at 320-21. Reviewing the program, the *Nusbaum II* court emphasized the neutral process by which students were chosen to participate in the program, *see id.* at 320, and the great lengths to which the legislature had gone to make sure that the inculcation of religious tenets did not take place, *see id.* at 325. Applying the primary effect test of *Lemon*, the court concluded that the program vio-

lated neither the Establishment Clause nor art. I, § 18. *See id.* at 322, 329.

¶ 60 In *Atwood*, 170 Wis. 218, this court upheld a program, much like the amended MPCP, that provided neutral educational assistance. The *Atwood* court considered the constitutionality of educational benefits for returning veterans that encompassed paying the cost of schooling, at any high school or college, including religious schools. Under that program, a student could choose a school, and the State directly paid to the schools the actual increased cost of operation attributed to the additional students. Upholding the program under art. I, § 18, the court concluded:

> The contention that financial benefit accrues to religious schools from [this program] is equally untenable. Only actual increased cost to such schools occasioned by the attendance of beneficiaries is to be reimbursed. They are not enriched by the service they render. Mere reimbursement is not aid.

Id. at 263-64.

¶ 61 In concluding that the amended MPCP violated art. I, § 18, the court of appeals relied heavily on this court's decisions in *State ex rel. Weiss v. District Board*, 76 Wis. 177, 44 N.W. 967 (1890) and *State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 156, 115 N.W.2d 761 (1962). We find the court's reliance was misplaced.

¶ 62 In *Weiss*, the court held that reading of the King James version of the Bible by students attending public school violated the religious benefits clause of art. I, § 18. Although the court's reasoning in *Weiss* may have differed from ours, its holding is entirely consistent with the primary effects test the Supreme Court has developed and we apply today. Requiring public school students to read from the Bible is neither neutral nor indirect. The Edgerton schools reviewed in *Weiss* were directly supported by

public funds, and the reading of the Bible was anything but religious-neutral. The program considered in *Weiss* is far different from the neutral and indirect aid provided under the amended MPCP. The holding in *Weiss*, therefore, does not control our inquiry in this case.

¶ 63 In *Reynolds*, 17 Wis. 2d 148, the court struck down a publicly supported transportation program it perceived was designed to benefit parochial schools. In reaching its conclusion, the *Reynolds* court applied a stricter standard under art. I, § 18 than that used by the Supreme Court under the Establishment Clause. *See id.* at 165. This court has since rejected applying this stricter standard in cases arising under the benefits clause of art. I, § 18. *See, e.g., Lindner*, 91 Wis. 2d at 163-64; *Nusbaum II*, 64 Wis. 2d at 328; *Reuter*, 44 Wis. 2d at 227. The court's analysis and conclusion in *Reynolds* are therefore not dispositive in our inquiry here.

¶ 64 The Respondents additionally argue that the amended MPCP violates the "compelled support clause" of art. I, § 18. The compelled support clause provides "nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry without consent . . . ." The Respondents assert that since public funds eventually flow to religious institutions under the amended MPCP, taxpayers are compelled to support places of worship against their consent. This argument is identical to the Respondents' argument under the benefits clause. We will not interpret the compelled support clause as prohibiting the same acts as those prohibited by the benefits clause. Rather we look for an interpretation of these two related provisions that avoids such redundancy. *See Kungys v. United States*, 485 U.S. 759, 778 (1988).

¶ 65 In *Holt*, 66 Wis. 2d 659, this court interpreted the compelled support provision and applied it to a state program under which public school children were released from school so that they could attend religious centers for

religious instruction. *See id.* at 676-77. In the context provided in *Holt*, the court interpreted the compelled support clause to prohibit the state from forcing or requiring students to attend or participate in religious instruction. *See id.* at 676. Under this interpretation, the court upheld the program, finding that the children participating in the program did so only by choice and that, although proof of attendance at the religious instruction was required, the program's requirements were directed at preventing deception rather than compelling attendance. *See id.* "Compulsion to attend is not, initially or subsequently, a part of the program." *Id.* at 677. The court therefore rejected the compelled support challenge.

¶ 66 Applying in this case the interpretation of the compelled support clause provided in *Holt*, we conclude that the amended MPCP does not violate that constitutional provision. Like the program in *Holt*, the amended MPCP does not require a single student to attend class at a sectarian private school. A qualifying student only attends a sectarian private school under the program if the student's parent so chooses. Nor does the amended MPCP force participation in religious activities. On the contrary, the program prohibits a sectarian private school from requiring students attending under the program to participate in religious activities offered at such school. The choice to participate in religious activities is also left to the students' parents. Since the amended MPCP neither compels students to attend sectarian private schools nor requires them to participate in religious activities, the program does not violate the compelled support clause of art. I, § 18.

¶ 67 In assessing whether the amended MPCP violates Wis. Const. art. IV, § 18, art. X, § 3, or the Wisconsin public purpose doctrine, we rely heavily on our analyses and conclusions in *Davis*, 166 Wis. 2d 501. In *Davis*, the school choice opponents attacked the original MPCP under a barrage of arguments similar to those raised by the Respondents in this case. Specifically, we

concluded in *Davis* that the original MPCP did not violate art. IV, § 18, art. X, § 3, or the public purpose doctrine. In this case, we limit our analysis to determining whether the amendments made to the original MPCP change either the analyses we relied upon or the conclusions we reached in *Davis*. Upon review we conclude that they do not.

III. Private or Local Bill

¶ 68 The third issue presented in this case is whether the amended MPCP is a private or local bill which was enacted in violation of the procedural requirements mandated by Wis. Const. art. IV, § 18.

¶ 69 Article IV, § 18 of the Wisconsin Constitution states in full: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." This constitutional provision addresses the form in which private or local legislation is enacted and not the substance of that legislation. *See Davis*, 166 Wis. 2d at 526. As we have explained, art. IV, § 18 serves three underlying purposes:

> 1) to encourage the legislature to devote its time to the state at large, its primary responsibility; 2) to avoid the specter of favoritism and discrimination, a potential which is inherent in laws of limited applicability; and 3) to alert the public through its elected representatives to the real nature and subject matter of legislation under consideration.

Milwaukee Brewers v. DHSS, 130 Wis. 2d 79, 107-08, 387 N.W.2d 254 (1986). "The requirements of art. IV, § 18 are prescribed to ensure accountability of the legislature to the public and to 'guard against the danger of legislation, affecting private or local interests, being smuggled through the legislature.'" *Davis*, 166 Wis. 2d at 519 (quoting *Milwaukee County v. Isenring*, 109 Wis. 9, 23, 85 N.W. 131 (1901). The question here is whether

the amended MPCP comes within the purview of art. IV, § 18.

¶ 70 In *Davis*, we set forth a two-fold analysis for assessing whether a bill or statute violates Wis. Const. art. IV, § 18:

> We must first address whether the process in which the bill was enacted deserves a presumption of constitutionality. Second, we must address whether the bill is private or local. If the bill is found to be private or local, then the requirements of art. IV, § 18 apply; namely, that the legislation must be a single subject bill and the title of the bill must clearly reflect the subject.

Id. at 520. We review the amended MPCP under this two-fold analysis.

¶ 71 Thus, our first inquiry is whether the process by which the amended MPCP was enacted deserves the presumption of constitutionality. Where the legislature is alleged to have violated a constitutional provision mandating the procedure by which bills must pass, we will not indulge in a presumption of constitutionality, "for to do so would make a mockery of the procedural constitutional requirement." *City of Brookfield v. Milwaukee Sewerage Comm'n*, 144 Wis. 2d 896, 912-13 n.5, 426 N.W.2d 591 (1988); *see City of Oak Creek v. DNR*, 185 Wis. 2d 424, 437, 518 N.W.2d 276 (Ct. App. 1994). "Nonetheless, this court may indulge the presumption of constitutionality where it is evident that the legislature did adequately consider or discuss the legislation in question, even where such legislation was passed as part of a voluminous bill." *Oak Creek*, 185 Wis. 2d at 437, *see Davis*, 166 Wis. 2d at 521-23.

¶ 72 We find no evidence in this case that the amended MPCP was smuggled or logrolled through the legislature. On the contrary, the record establishes that the legislature "intelligently participate[d] in considering"

the amended MPCP. *Davis*, 166 Wis. 2d at 523 (quoting *Brookfield*, 144 Wis. 2d at 912 n.5). According to the the Agreed Upon Statement of Facts in this case, the amendments to the original MPCP were proposed by the Governor as a portion of the 1995-1997 biennial budget bill, which was referred to the Joint Committee on Finance. During the spring of 1995, the proposed amendments to the original MPCP, along with other aspects of the biennial budget, were discussed at public hearings throughout the state.[23] The proposed amendments were then debated, specifically amended, and in June 1995, adopted by the Joint Committee on Finance. The Assembly then debated, specifically amended, held a public hearing on, and passed the proposed amendments as part of the biennial budget bill. The biennial budget bill was then referred to the Senate. The Senate held public hearings on, debated, and concurred in the proposed amendments to the original MPCP. On July 26, 1995, the amended MPCP was enacted as a portion of the 1995-97 State of Wisconsin Biennial Budget, 1995 Wis. Act 27.

¶ 73 Under the stipulated facts of this case, we find it evident that the amended MPCP was not smuggled through the legislature, but rather was forged in the deliberative kiln of public debate. The legislature adequately considered and discussed the amended MPCP, even though the proposed amendments were ultimately enacted as part of a multi-subject bill. We therefore find it proper to apply a presumption of constitutionality to the process in which the amended MPCP was enacted into law.

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23 Public hearings on the proposed amendments to the original MPCP and other aspects of the biennial budget bill were held in the City of Milwaukee on April 3, 1995, in Cedarburg on March 21, 1995, in Madison on March 27, 1995, in Portage on March 23, 1995, and in River Falls on March 30, 1995. *See* Record Document 211A at 7.

¶ 74 Our next line of inquiry is whether the amended program is "private or local" legislation. *See Davis,* 166 Wis. 2d at 524. The term "private or local" is not defined in the constitution. Legislation that is geographically specific will not automatically be considered private or local where the general subject matter of the legislation relates to a state responsibility, that is when "the subject thereof is such that the state itself has an interest therein as proprietor, or as trustee, or in its governmental capacity, for the benefit or in the interest of the general public." *Milwaukee Brewers,* 130 Wis. 2d at 111 (citations and internal quotations omitted).

¶ 75 To assess whether the amended MPCP is private or local legislation, we apply the test this court created in *Brookfield. See Davis,* 166 Wis. 2d at 527.[24] The *Brookfield* test comprises five elements:

> First, the classification employed by the legislature must be based on substantial distinctions which make one class really different from another.
>
> Second, the classification adopted must be germane to the purpose of the law.
>
> Third, the classification must not be based on existing circumstances only. Instead, the classification must be subject to being open, such that other cities could join the class.
>
> Fourth, when a law applies to a class, it must apply equally to all members of the class.
>
> . . . [F]ifth, the characteristics of each class should be so far different from those of the other classes so

[24] In assessing whether the amended MPCP is private or local legislation, we apply the five-factor test created in *City of Brookfield v. Milwaukee Sewerage Dist.*, 144 Wis. 2d 896, 426 N.W.2d 591 (1988), because the amended MPCP is not specific on its face, involves classifications, does not violate Wis. Const. art. IV, § 31, but allegedly runs afoul of art. IV, § 18. *See id.* at 912; *see also Davis v. Grover*, 166 Wis. 2d 501, 525, 480 N.W.2d 460 (1992).

> as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Davis, 166 Wis. 2d at 526 (quoting *Brookfield*, 144 Wis. 2d at 907-09).

¶ 76 In *Davis*, we held that the original MPCP satisfied all five elements of the *Brookfield* test and therefore was not private or local legislation subject to the procedural requirements in art. IV, § 18. *See Davis*, 166 Wis. 2d at 537. The 1995 amendments to the original MPCP did not change the program in any way that would alter our analyses or conclusions in *Davis* as to the first, third, fourth, and fifth elements of the *Brookfield* test.[25] In this case, the Respondents assert only that, as a result of the changes made to the program since *Davis*, the classification imposed by the amended MPCP does not satisfy the second element of the *Brookfield* test. We therefore limit our discussion to the second element of the *Brookfield* test.

¶ 77 The second element of the *Brookfield* test requires that "the classification adopted must be germane to the purpose of the law." *Brookfield*, 144 Wis. 2d at 907, 917-20. In *Davis*, we concluded that the original MPCP satisfied this element because it was "an experiment intended to address a perceived problem of inadequate educational opportunities for disadvantaged children." *Davis*, 166 Wis. 2d at 530, 535. We there explained:

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[25] In all aspects relevant to the first, third, fourth, and fifth elements of the *Brookfield* test, the amended MPCP is identical to the original MPCP upheld in *Davis*. First, like the original program, the amended MPCP involves a classification recognized and accepted by this court: cities of the first class. Second, since other cities can join this class, the classification is subject to being open. Third, the amended MPCP, by its terms, applies equally to all qualifying cities. Finally, the characteristics of cities of the first class are sufficiently different from those of other classes of cities so to suggest at least the propriety of substantially different legislation. *See Davis*, 166 Wis. 2d at 526-37.

> [T]he classification of first class cities is germane to the purpose of the law. Clearly, improving the quality of education and educational opportunities in Wisconsin is a matter of statewide importance. The best location to experiment with legislation aimed at improving the quality of education is in a first class city, a large urban area where the socio-economic and educational disparities are greatest and the private educational choices are most abundant.

Id. at 535.

¶ 78 The Respondents contend that our holding in *Davis* does not control the determination in this case because the amended MPCP is no longer experimental in nature and therefore the classification of cities of the first class is no longer germane to the purpose of that law. We disagree. Despite some amendments, the program has retained its experimental character. In concluding that the original MPCP was experimental legislation, the *Davis* court focused on two characteristics of the program: its limited participation (one percent of MPS membership) and its data compilation and reporting provisions. *See id.* at 533-34. The amended MPCP has retained these two characteristics.

¶ 79 First, like the original program, the amended MPCP is not an abandonment of the public school system. With the 1995 amendments, the legislature expanded the program by increasing to 15 percent of total MPS membership the number of financially disadvantaged students eligible to attend private schools under the amended MPCP. Even though this represents a substantial increase in the total number of students eligible to participate, the program still affects only a small portion of MPS membership. No less than 85 percent of the MPS membership will be unaffected by the amended MPCP. Although it provides a somewhat larger view, the amended MPCP

still provides but a "window of opportunity to test the effectiveness of an alternative to the MPS." *Id.* at 533.[26]

¶ 80 Second, like the original program, the amended MPCP continues to allow the State to measure the effects of choice and competition on education. *See Davis*, 166 Wis. 2d at 533. Witn the 1995 amendments, the legislature deleted some of the monitoring requirements from the original plan. Specifically, the legislature deleted the requirement that the State Superintendent conduct annual performance evaluations and report to the legislature, and it eliminated the Superintendent's authority to conduct financial or performance evaluation audits of the program. *See* 1995 Wis. Act 27 at §§ 4007m and 4008m. The amended MPCP, however, requires the Legislative Audit Bureau to conduct a financial and performance evaluation of the program and to submit it to each house of the legislature by January 15, 2000. *See id.* at § 4008s.

¶ 81 The mere fact that the legislature has chosen to conduct one evaluation in the year 2000 rather than on an annual basis does not destroy the experimental nature of the amended MPCP. As we explained in *Davis*, "[t]his experiment tests a theory of education." *Id.* at 534. The effects of this experiment will be measured not only by the test scores or graduation rates of those students to whom "life preservers" have been thrown,[27] but also by the education those students who remain in MPS receive. Nor will the success or failure of this experiment

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[26] Rather than destroying the program's experimental nature, the expansion of the program to a larger sample of students may make it easier for researchers to measure the effectiveness of this experiment in education. *See* Jay P. Greene, Paul E. Peterson, & Jiangtao Du, *The Effectiveness of School Choice in Milwaukee: A Secondary Analysis of Data From the Program's Evaluation*, at 26-27.

[27] *See Davis*, 166 Wis. 2d at 547 (Ceci, J., concurring) ("The Wisconsin legislature . . . has attempted to throw a life preserver to those Milwaukee children caught in the cruel riptide of a school system floundering upon the shoals of poverty, status-quo thinking, and despair.").

be measured by focusing solely on those students participating in the program, but also by considering whether parental choice spurs competitiveness and innovation within the public education system. The legislature has provided a reasonable process by which to review the effects of the amended MPCP. Article IV, § 18 does not dictate a particular timetable for such review. We therefore express no opinion whether yearly evaluations or one evaluation at the end of four years will provide a more accurate or more cost-effective measure of the amended MPCP's effects.

¶ 82 In short, we conclude that the amended MPCP, like the original program, is experimental legislation intended to address a perceived problem in the quality of education and educational opportunities in Wisconsin. The best location to experiment with such a program is in a city of the first class, where "socio-economic and educational disparities . . . are most abundant." *Id.* at 535. The amended MPCP's classification of cities of the first class is therefore germane to the purpose of the law. The second element of the *Brookfield* test is satisfied. Accordingly, we hold that the amended MPCP is not a private or local bill within the meaning of Wis. Const. art. IV, § 18, and thus not subject to its procedural requirements.

IV. Uniformity Clause

¶ 83 The fourth issue presented in this case is whether the amended MPCP violates the uniformity provision of Wis. Const. art. X, § 3. The court of appeals did not reach this issue, and the circuit court concluded that the amended program does not violate the uniformity clause.

¶ 84 Wisconsin Constitution art. X, § 3 states:

> The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between

> the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; . . . .

¶ 85 The Respondents first argue that the amendments to the program, primarily the removal of funding that prevented a private school from operating solely on public funds, effectively transforms private schools participating in the amended MPCP into district schools subject to the nonsectarian clause of art. X, § 3. As in *Davis,* the key to this argument is whether private schools, by participating in the amended MPCP, become "district schools" for the purposes of the uniformity clause. We conclude that they do not.

¶ 86 Relying on the classification in Wis. Stat. § 115.01(1) and on the fact that a private school could receive 100 percent of its tuition from public funds, the Respondents contend that private schools participating in the amended MPCP will become "public schools" because they will be "elementary and high schools supported by public taxation." In *Davis* this court squarely rejected the argument that private schools receiving state funds under the original MPCP were "district schools" to which the uniformity requirement applies. *See Davis,* 166 Wis. 2d at 538. The court noted that the original MPSP explicitly referred to paticipating schools as "private schools" and observed that "[i]n no case have we held that the mere appropriation of public monies to a private school transforms that school into a public school." *Id.* at 539-40.

¶ 87 We apply the same reasoning in this case. Like the original MPCP, the amended program expressly refers to participating schools as "private schools." The term "private school" is defined by statute to include those private institutions satisfying the requirements of Wis. Stat. § 118.165 or determined to be a private school by the State Superintendent under Wis. Stat. § 118.167. *See* Wis. Stat. § 115.001(3r). "We assume that the legislature was aware of this statutory meaning and intended to use 'private school' . . . as a statutory term of art." *Davis,*

166 Wis. 2d at 538. As in *Davis*, we conclude that the mere appropriation of public monies to a private school does not transform that school into a district school under art. X, § 3. This conclusion is not affected by the amount of public funds a private school receives.

¶ 88 The Respondents also argue that art. X, § 3 prohibits the State from diverting students and funds away from the public school system. Article X, § 3, the Respondents contend, requires that the district schools be the only system of state-supported education. This argument too was raised and specifically rejected in *Davis*. *See Davis*, 166 Wis. 2d at 538-40.

¶ 89 In *Davis*, the choice opponents argued that the explicit requirement in art. X, § 3 that the State establish public district schools implicitly prohibits the legislature from spending public funds to support any schools other than district schools. As a dissenting opinion argued: "the constitutional system of public education was intended to be the only general school instruction to be supported by taxation." *Davis*, 166 Wis. 2d at 558 (Abrahamson, J., dissenting). The court, relying on precedent of this court, rejected that contention. *See id.* at 537-38 (citing *State ex rel. Comstock v. Joint Sch. Dist. No. 1*, 65 Wis. 631, 636-37, 27 N.W. 829 (1886) and *Kukor v. Grover*, 148 Wis. 2d 469, 496-97, 436 N.W.2d 568 (1989)); *accord Buse v. Smith*, 74 Wis. 2d 550, 565, 247 N.W.2d 141 (1976); *Reuter*, 44 Wis. 2d at 221; *City of Manitowoc v. Town of Manitowoc Rapids*, 231 Wis. 94, 98, 285 N.W. 403 (1939). Applying the reasoning of *Comstock* and *Kukor*, the court concluded that art. X, § 3 provides not a ceiling but a floor upon which the legislature can build additional opportunities for school children in Wisconsin:

> The uniformity clause clearly was intended to assure certain minimal educational opportunities for the children of Wisconsin. It does not require the legislature to ensure that all of the children in Wisconsin

> receive a free uniform basic education. Rather, the uniformity clause requires the legislature to provide the opportunity for all children in Wisconsin to receive a free uniform basic education.

Davis, 166 Wis. 2d at 539.

¶ 90 Similar to the original MPCP upheld in *Davis*, the amended MPCP in no way deprives any student of the opportunity to attend a public school with a uniform character of education. By enacting the amended MPCP, the State has merely allowed certain disadvantaged children to take advantage of alternative educational opportunities in addition to those provided by the State under art. X, § 3. The students participating in the amended MPCP do so by choice and may withdraw at any time and return to a public school. "[W]hen the legislature has provided for each [] child the privileges of a district school, which he or she may freely enjoy, the constitutional requirement in that behalf is complied with." *Comstock*, 65 Wis. at 636-37. As in *Davis*, we conclude that the legislature has done so here. The amended MPCP merely reflects a legislative desire to do more than that which is constitutionally mandated.

¶ 91 We therefore hold that the sectarian private schools participating in the MPCP do not constitute "district schools" for the purposes of the uniformity clause. We also reaffirm the position that the legislature has fulfilled its constitutional duty to provide for the basic education of our children. The State's experimental attempts to improve upon that foundation in no way deny any student the opportunity to receive the basic education in the public school system. *See Davis*, 166 Wis. 2d at 539.

V. Public Purpose Doctrine

¶ 92 The Fifth issue presented in this case is whether the amended MPCP violates Wisconsin's public purpose doctrine. The court of appeals did not reach this issue, and the circuit court concluded that it does.

¶ 93 The public purpose doctrine, although not recited in any specific clause in the state constitution, is a well-established constitutional doctrine. *See Hopper v. City of Madison*, 79 Wis. 2d 120, 128, 256 N.W.2d 139 (1977). As this court stated in *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 414, 208 N.W.2d 780 (1973), "[p]ublic funds may be expended for only public purposes. An expenditure of public funds for other than a public purpose would be abhorrent to the constitution of Wisconsin."

¶ 94 Under the public purpose doctrine, "[w]e are not concerned with the 'wisdom, merits or practicability of the legislature's enactment.' Rather we are to determine whether a 'public purpose can be conceived which might reasonably be deemed to justify or serve as a basis for the expenditure.'" *Millers Nat'l Ins. v. City of Milwaukee*, 184 Wis. 2d 155, 175-76, 516 N.W.2d 376 (1994) (quoting *Hopper*, 79 Wis. 2d at 129) (internal citation omitted). "A court can conclude that no public purpose exists only if it is 'clear and palpable' that there can be no benefit to the public." *La Plante*, 58 Wis. 2d at 56 (citation omitted).

¶ 95 No party disputes that education constitutes a valid public purpose, or that private schools may be employed to further that purpose. Education ranks at the apex of a state's function. *See Yoder*, 406 U.S. at 213; *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). This court has long recognized that equal educational opportunities are a fundamental right, *see, e.g., Buse*, 74 Wis. 2d 550, and that the State has broad discretion to determine how best to ensure such opportunities. *See Davis*, 166 Wis. 2d at 541-44; *Kukor*, 148 Wis. 2d 492-94; *Atwood*, 170 Wis. at 263-64.

¶ 96 The parties in this case dispute only whether the private schools participating in the amended program are under proper governmental control and supervision, as required by *Wisconsin Industrial School for Girls*, 103

Wis. at 668. *See Davis,* 166 Wis. 2d at 541-42; *Reuter,* 44 Wis. 2d at 216. The Respondents allege that the amended MPCP lacks sufficient control and accountability to secure a public interest. They note that some of the reporting requirements in the original MPCP upon which the court in *Davis* focused have been eliminated by amendment.

¶ 97 The control and accountability requirements imposed under the public policy doctrine are not demanding. *See Reuter,* at 216. In *Davis* we explained:

> To test the propriety of expending public monies to a private institution for public purposes, this court must determine whether the private institution is under reasonable regulations for control and accountbility to secure public interests. 'Only such control and accountability as is reasonably necessary under the circumstances to attain the public purpose is required.'

Davis, 166 Wis. 2d at 542 (quoting *Reuter,* 44 Wis. 2d at 216) (internal citation omitted). We therefore must determine only whether the amended MPCP includes control and accountability requirements reasonably necessary to secure the public purpose to which it is directed.

¶ 98 The control and accountability arguments raised by the Respondents in this case were largely handled by this court in *Davis. See id.* at 541-45. In *Davis,* we upheld the original MPCP under a public purpose doctrine challenge. As in this case, the choice opponents in *Davis* argued that the controls in the original MPCP were woefully inadequate. We there concluded that the statutory controls applicable to private schools coupled with parental choice sufficed to ensure that the public purpose was met. *See id.* at 546.

¶ 99 Similarly, in *Reuter* this court held that public appropriations to a private medical school did not violate the public purpose doctrine where the circumstances pre-

sented "no frivolous pretext for giving money to a private school but the using of a private school to attain a public purpose." *Reuter*, 44 Wis. 2d at 214. The court noted that the private school was not regulated to the same extent as public schools, but it concluded that:

> A private agency cannot and should not be controlled as two-fistedly as a government agency. . . . A private agency is selected to aid the government because it can perform the service as well or better than the government. We should not bog down private agencies with unnecessary government control. . . . We do not think it is necessary or required by the constitution that the state must legally be able to control the agency corporation in order to find sufficient regulations for control and accountability. The state is not interested in controlling the day-to-day operation of the medical school but in its end product.

Id. at 217.

¶ 100 In light of the standard applied in *Davis* and *Reuter*, we conclude that control and accountability safeguards in the amended MPCP are sufficient to ensure that the program fulfills its purpose of promoting education. First, the private schools participating in the amended MPCP continue to be subject to the instruction, curriculum, and attendance regulations that govern all private schools. See Wis. Stat. §§ 118.165(1) and 118.167; *Davis*, 166 Wis. 2d at 543. Second, the amended MPCP continues to require an annual financial audit by the State Superintendent and provides for an additional review by the Legislative Audit Bureau covering both financial and performance evaluations of the plan. *See* Wis. Stat. § 119.23(7)(am), (9). Finally, as in *Davis*, the schools participating in the amended MPCP are also subject to the additional checks inherent in the notion of school choice. "Control is also fashioned with the [plan] in the form of parental choice. . . . If the private school does

not meet the parents' expectations, the parents may remove the child from the school and go elsewhere." *Davis*, 166 Wis. 2d at 544. These combined elements of the amended MPCP are more than sufficient control and accountability measures to ensure that the program serves the public purpose to which it is directed.

¶ 101 The Respondents additionally argue that the amended MPCP violates the public purpose doctrine because it funds religious education and other religious activities that are not public purposes. The Respondents argue, and the circuit court held, that because public funds flow to religious private schools, the program does not serve a public purpose. We find this argument unfounded. We have never interpreted the public purpose doctrine to incorporate an anti-establishment principle. That the State has chosen to include sectarian private schools in the amended MPCP does not render the program's public purpose invalid. Whether the State may adopt such an approach is an issue we resolve under the provisions of art. I, § 18.

¶ 102 We therefore hold that the amended MPCP does not violate the public purpose doctrine because it fulfills a valid public purpose, and it contains sufficient and reasonable controls to attain its public purpose.

VI. NAACP's Equal Protection Claim

¶ 103 In addition to the challenges raised by the Respondents, the NAACP alleges that the amended MPCP violates the equal protection clauses of the Fourteenth Amendment to the United States Constitution and art. I, § 1 of the Wisconsin Constitution.[28] Although this issue

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[28] The Fourteenth Amendment to the United States Constitution provides "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The functional equivalent of this clause is found in Wis. Const. art. I, § 1:

was not addressed by the circuit court or the court of appeals, it was briefed and argued before this court by the NAACP. Upon review, we conclude that the NAACP's facial equal protection claim must fail as a matter of law.

¶ 104 It is the often repeated rule in this state that issues not considered by the circuit court will not be considered for the first time on appeal. *See Binder v. City of Madison*, 72 Wis. 2d 613, 618, 241 N.W.2d 613 (1976); *Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980). This rule is not absolute, however, and exceptions are made. *See Binder*, 72 Wis. 2d at 618; *Cords v. State*, 62 Wis. 2d 42, 54, 214 N.W.2d 405 (1974). In this case, all the issues raised are legal questions that can be disposed of "based upon a consideration of the record." *State v. Conway*, 34 Wis. 2d 76, 83, 148 N.W.2d 721 (1967); *see Smith v. Katz*, No. 96-1998, op. at 9 (S. Ct. June 2, 1988); *Wirth*, 93 Wis. 2d at 443-44. In the interests of judicial economy and the finality of this decision, we exercise our discretion to decide the entire case while it is before us. *See Carlson & Erickson Builders v. Lampert Yards*, 190 Wis. 2d 650, 656, 529 N.W.2d 905 (1995); *Burger v. Burger*, 144 Wis. 2d 514, 518, 424 N.W.2d 691 (1988); *Wirth*, 93 Wis. 2d at 444. We therefore proceed to address the NAACP's equal protection claim.

¶ 105 The Fourteenth Amendment guarantee of equal protection provides "a right to be free from invidious dis-

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"All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." As we noted in *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 49-50, 132 N.W.2d 249 (1965) even though art. I, § 1 is based on the Declaration of Independence, "there is no substantial difference" between its equal protection and due process provisions and that of the Fourteenth Amendment. Thus, in our analysis of the NAACP's equal protection argument, the two constitutional provisions are treated as equivalent. *See id.* at 50.

crimination in statutory classifications and other governmental activity." *Harris v. McRae*, 448 U.S. 297, 322 (1980). The central purpose of the Equal Protection Clause is to prevent "official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). To show racial discrimination in violation of this guarantee, a plaintiff must show that a statute was enacted with a purpose or intent to discriminate. *See id.* at 242; *see also Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-265 (1977). The Supreme Court has adhered to this principle in school desegregation cases: "that there are both predominately black and predominately white schools in a community is not alone violative of the Equal Protection Clause." *Davis*, 426 U.S. at 240 (citing *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973)). Even accepting the NAACP's allegations as true and construing them liberally, *see Scarpaci v. Milwaukee County*, 96 Wis. 2d 663, 669, 292 N.W.2d 816 (1980), we conclude that the NAACP's allegations do not support a claim of a violation of equal protection.

¶ 106 In its facial challenge, the NAACP has not alleged, and we cannot reasonably infer, that the State acted wtih an intent to discriminate on the basis of race when the State enacted the amended MPCP. Although the NAACP generally concludes that the purposes of the MPCP were expanded to include segregation of the races in the MPS, the NAACP does not allege that the State enacted the amended MPCP with the intent to discriminate based on race. Nor does the NAACP allege that the private schools participating in the amended program have excluded students on the basis of race or have in any other way intentionally discriminated against students based on race.[29]

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[29] In its brief and at oral argument, the NAACP relied heavily on *Norwood v. Harrison*, 413 U.S. 455 (1973). The claims made in *Norwood* are distinguishable from those made by the NAACP in

¶ 107 We note that, on its face, the amended MPCP is race-neutral. As we have explained, the amended MPCP allows a group of students, chosen without regard to race, to attend schools of their choice. Furthermore, the amended MPCP requires participating schools to comply with the antidiscrimination provisions of 42 U.S.C. § 2000d. *See* Wis. Stat. § 119.23(2)(a)4. In addition, the participating schools are required to select program students on a random basis. *See id.* at § 119.23(3)(a).

¶ 108 None of the facts presented by the NAACP support a claim that the State enacted the amended MPCP with an intent or purpose to discriminate based on race. Relying solely on the racial makeup of the MPS and of the private schools likely to participate in the amended MPCP, the NAACP alleges that the program violates equal protection because its likely effect will be to further segregate the MPS. We recognize that an invidious discriminatory purpose may be inferred from the totality of the relevant facts, including the fact that a challenged law may, in effect, bear more heavily on one race than another. *See Davis*, 426 U.S. at 242. We, however, can make no such inference in this case. In its *facial* challenge, the NAACP cannot establish facts sufficient to show that the amended MPCP has had a disproportionate impact on one race or that its provisions have been applied so as to invidiously discriminate on the basis of race. The

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this case. First, the plaintiffs in *Norwood* did not raise a facial challenge to the Mississippi textbook program, but rather challenged the program as it applied to particular private schools. *See id.* at 457. Second, unlike the NAACP in this case, the plaintiffs in *Norwood* alleged that the private schools receiving benefits under the textbook program had racially discriminatory policies and had excluded students on the basis of race. *See id.* Third, the plaintiffs in *Norwood* alleged that the State lent textbooks to private schools without regard to whether any of those schools had racially discriminatory policies. *See id.* at 456. In contrast to the program in *Norwood*, the amended MPCP requires that all participating schools comply with the anti-discrimination provisions of 42 U.S.C. § 2000d. *See* Wis. Stat. § 119.23(2)(a)4.

NAACP's current facial challenge and our review in this case is limited to the statute on its face and to the stipulated facts. From the record before us, we conclude that the NAACP has not sufficiently alleged that the State enacted the amended MPCP with the discriminatory intent necessary to establish an equal protection claim. *See Davis*, 426 U.S. at 238-48.

¶ 109 While we accept as true the facts pled, we are not required to assume as true the legal conclusions pled by the NAACP. *See State v. Wisconsin Tel. Co.*, 91 Wis. 2d 702, 720, 284 N.W.2d 41 (1979). We find that there are no circumstances under which the NAACP can prevail in its facial equal protection challenge to the amended MPCP. We therefore conclude that the NAACP's claim must be dismissed as a matter of law for failure to state a claim upon which relief can be granted. *See Voss*, 162 Wis. 2d at 748; *Evans v. Cameron*, 121 Wis. 2d 421, 426, 360 N.W.2d 25 (1985).

VII. Severability

¶ 110 Since we find that the amended MPCP passes constitutional scrutiny in all the issues presented before this court, we need not consider whether individual provisions are severable from Wis. Stat. § 119.23.

VIII. Injunction

¶ 111 On August 25, 1995, this court granted an injunction enjoining implementation of all portions of the amended MPCP. After further proceedings, the circuit court dissolved this injunction for all portions of the amended program except with respect to the participation of sectarian private schools. Since we now conclude that the amended program is constitutional in its entirety, we order the circuit court to dissolve the injunction for all portions of the amended MPCP.

¶ 112 When the injunction first issued against implementation of the amended MPCP, thousands of children

who were eligible for full tuition under the program already had enrolled in or begun attending their new private schools. Faced with having to remove their children from their chosen schools, many parents accepted private assistance to keep their chidlren in those schools. When the injunction is lifted, many of these students no longer will be eligible to participate in the amended MPCP because they are already attending private schools. *See* Wis. Stat. § 119.23(2)(a)2. Their ineligibility is no fault of their own, but instead is solely a consequence of this litigation. Those children certainly are among the intended beneficiaries of this program. To require them to return to MPS for a year to reestablish eligibility would be manifestly inequitable and disruptive to the public schools, to the private schools, and most importantly, to the children themselves.

¶ 113 In dissolving the injunction, we therefore remove the disability that the injunction placed on the school children, so that with respect to educational status, eligibility under the amended MPCP is determined on the date the injunction was issued.

IX. Conclusion

¶ 114 In conclusion, based upon our review of both the statute now before us and the stipulated facts, we conclude that the amended MPCP does not violate the Establishment Clause of the First Amendment; Wis. Const. art. I, § 18; art. IV, § 18; art. X, § 3; or the Wisconsin public purpose doctrine. We therefore reverse the decision of the court of appeals and remand the matter to the circuit court with directions to grant the State's motion for summary judgment, to dismiss the NAACP's facial equal protection claim, and to dissolve the injunction barring the implementation of the amended MPCP.

By the Court.—The decision of the court of appeals is reversed, and the cause is remanded to the circuit court for further proceedings consistent with this opinion.

§ 115 ANN WALSH BRADLEY, J. did not participate.

¶ 116 WILLIAM A. BABLITCH, J. (*dissenting*). I conclude, as did a majority of the court of appeals, *see Jackson v. Benson* 213 Wis. 2d 1, 570 N.W.2d 407 (Ct. App. 1997), that the amended Milwaukee Parental Choice Program violates the prohibition contained in Wis. Const. art. I, § 18, against state expenditures for the benefit of religious societies or seminaries. For the reasons recited therein, I respectfully dissent.

¶ 117 I am authorized to state that Chief Justice Shirley S. Abrahamson joins in this dissent.

APPENDIX B

[Filed Aug. 2, 1997]

[Court of Appeals Decision Dated and Released
August 22, 1997]

IN COURT OF APPEALS
DISTRICT IV
STATE OF WISCONSIN

No. 97-0270

WARNER JACKSON, JENNIFER EVANS, WENDELL HARRIS, THE REVEREND ANDREW KENNEDY, RABBI ISAAC SEROTTTA, CEIL ANN LIBBER, FATHER THOMAS J. MUELLER, REVEREND JOHN N. GREGG, DIANE BREWER, COLLEEN BEAMAN, MARY MORRIS, PENNY MORSE, KATHLEEN JONES AND PHILIP JONES,

Plaintiffs-Respondents,

v.

JOHN T. BENSON, SUPERINTENDENT OF PUBLIC INSTRUCTION, DEPARTMENT OF PUBLIC INSTRUCTION AND JAMES E. DOYLE,

Defendants-Appellants,

MARQUELLE MILLER, CYNTHIA MILLER, ANGELA GRAY, ZACHERY GRAY, SHON RICHARDSON, GEORGE RICHARDSON, LATRISHA HENRY, FAYE HENRY, REIGNE BARRETT, VALERIE BARRETT, CANDICE WILLIAMS, SENTON WILLIAMS, CLINTRAI GILES, SHARON GILES, PARENTS FOR SCHOOL CHOICE, PILAR GONZALEZ, DINAH COOLEY, JULIE VOGEL, KATE HELSPER, BLONG YANG, GAIL CROCKETT, YOLANDA LASSITER AND JEANINE KNOX,

Intervenors-Defendants-Appellants.

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, BY ITS PRESIDENT, M. CHARLES HOWARD, MICHAEL LENGYEL, DONALD LUCIER, TRACY ADAMS, MILWAUKEE PUBLIC SCHOOLS ADMINISTRATORS AND SUPERVISORS COUNCIL, INC., BY ITS EXECUTIVE DIRECTOR, CARL A. GOBEL, PEOPLE FOR THE AMERICAN WAY, BY ITS EXECUTIVE VICE PRESIDENT AND LEGAL DIRECTOR, ELLIOTT M. MINCEBERG, JOHN DREW, SUSAN ENDRESS, RICHARD RILEY, JEANETTE ROBERTSON, VINCENT KNOX, BERTHA ZAMUDIO, JAMES JOHNSON, ROBERT ULLMAN AND SALLY F. MILLS,

Plaintiffs-Respondents,

v.

JOHN T. BENSON, SUPERINTENDENT OF PUBLIC INSTRUCTION, DEPARTMENT OF PUBLIC INSTRUCTION AND JAMES E. DOYLE,

Defendants-Appellants,

MARQUELLE MILLER, CYNTHIA MILLER, ANGELA GRAY, ZACHERY GRAY, SHON RICHARDSON, GEORGE RICHARDSON, LATRISHA HENRY, FAYE HENRY, REIGNE BARRETT, VALERIE BARRETT, CANDICE WILLIAMS, SENTON WILLIAMS, CLINTRAI GILES, SHARON GILES, PARENTS FOR SCHOOL CHOICE, PILAR GONZALEZ, DINAH COOLEY, JULIE VOGEL, KATE HELSPER, BLONG YANG, GAIL CROCKETT, YOLANDA LASSITER AND JEANINE KNOX,

Intervenors-Defendants-Appellants.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, FELMERS O. CHANEY, LOIS PARKER, on behalf of herself and her minor child, RASHAAN HOBBS, DERRICK D. SCOTT, on behalf of himself and his minor children, DERESIA C.A. SCOTT AND DESMOND L.J. SCOTT, CONSTANCE J. CHERRY, on behalf of herself and her minor children, MONIQUE J. BRANCH, MONICA S. BRANCH, AND WILLIAM A. BRANCH,

Plaintiffs-Respondents,

v.

JOHN T. BENSON, SUPERINTENDENT OF PUBLIC INSTRUCTION OF WISCONSIN, in his official capacity,
Defendant-Appellant.

APPEAL from an order of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

DEININGER, J. The Milwaukee Parental Choice Program, § 119.23, STATS., as amended by 1995 Wis. Act 27, §§ 4002-4009, permits up to 15% of the student membership of the Milwaukee Public School (MPS) system to attend private schools, both sectarian and nonsectarian, at state expense. Plaintiffs brought these actions claiming that the amended program violates the First Amendment of the U.S. Constitution and various provisions of the Wisconsin Constitution. Defendants appeal the trial court's order which granted plaintiffs' motions for summary judgment and declared the amended program unconstitutional. Because we conclude that the amended program violates the religious benefit clause of Article I, section 18 of the Wisconsin Constitution,[1] we affirm.

BACKGROUND

The parties have stipulated to certain facts. The following background summary is taken from the agreed upon facts, including attached exhibits, and with respect to certain matters, from the trial court's decision and order.

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[1] Article I, section 18 of the Wisconsin Constitution provides in part: ". . . nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

a. The Original Milwaukee Parental Choice Program

The legislature enacted the Milwaukee Parental Choice Program, § 119.23, STATS., as a part of 1989 Wis. Act 336. As amended in 1993, the program permitted up to 1.5% of the pupil "membership" [2] of MPS to attend "at no charge, any nonsectarian private school located" in the City of Milwaukee, subject to certain eligibility requirements. The total pupil membership of MPS was more than 98,000 for the 1995-96 school year. Approximately 1500 pupils were permitted to participate under the original program, and as we discuss below, approximately 15,000 pupils would be eligible for the program as subsequently amended in 1995. Eligibility for participation in the program is limited to pupils from families whose income does not exceed 1.75 times the federal poverty level.

A private school accepting students under the program must notify the State Superintendent of Public Instruction of its intent to participate by May 1st of the previous school year. Additionally, a private school accepting students under the program must comply with state and federal anti-discrimination laws, and with health and safety provisions that apply to public schools. Not more than 65% (originally 49%) of a private school's enrollment may consist of pupils attending the private school under the original program. In order to continue participation in the program in subsequent years, a private school must satisfy certain performance criteria, assuring that at least a certain percentage of the pupils participating in the program advance one grade level each year, maintain a certain average attendance rate, demonstrate significant academic progress, or meet parent involvement criteria established by the school.

In return for accepting students under the original program, a private school receives payments directly from the

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[2] School district "membership" is defined in § 121.004(5), STATS.

State equal to the amount of state aid per student to which MPS would be entitled under state school aid distribution formulas. The aid amount was approximately $2500 per student in the initial year of the program. The amount of state aid received by MPS is reduced by the amount of payments made to private schools under the program.

The original program called for extensive monitoring, evaluation, and reporting regarding the program and its participants. Specifically, the State Superintendent of Public Instruction was required to submit an annual report to the legislature regarding student achievement, attendance, discipline, and parental involvement for students in the program as compared to pupils enrolled in MPS district schools. The original statute further directed the State Superintendent to monitor performance of pupils in the program and empowered him or her to conduct one or more financial and performance evaluation audits of the program. The legislative audit bureau was also directed to perform a financial and performance audit and to report to the legislature by January 15, 1995.

During the 1994-95 school year, approximately 800 pupils attended approximately twelve nonsectarian private schools under the original program. For 1995-96, there were approximately 1600 pupils attending approximately seventeen nonsectarian private schools under the program.

The original program withstood a state constitutional challenge in *Davis v. Grover*, 166 Wis.2d 501, 480 N.W.2d 460 (1992). The court determined that the original program "was an experiment intended to address a perceived problem of inadequate educational opportunities for disadvantaged children." *Id.* at 530, 480 N.W.2d at 470 (citation omitted). It concluded that the enactment of the original program did not constitute a "private or local bill" within the meaning of Article IV, section 18 of the Wisconsin Constitution; that the private schools participating in the program did not constitute "district

schools" for purposes of the "district school uniformity clause," Article X, section 3 of the Wisconsin Constitution; and that sufficient safeguards providing governmental control and supervision of the program existed to insure that the "public purpose doctrine" was not violated.

b. The Amended Milwaukee Parental Choice Program

In the biennial budget bill, 1995 Wis. Act 27, §§ 4002-4009, the legislature significantly amended the original program. Amendments to the program include the following:

(1) The limitation that participating private schools be "nonsectarian" was removed. *See id.* § 4002.

(2) Allowable pupil participation was increased to 7%, and eventually 15%, of the MPS pupil membership. *See id.* § 4003.

(3) The requirement for the State Superintendent's annual performance evaluation and report to the legislature was deleted, as was the superintendent's authority to conduct "one or more financial or performance evaluation audits" of the program. *See id.* §§ 4007m and 4008m.

(4) A change was made in the way state aid payments to participating private schools is administered. Instead of making the state aid for participating students payable directly to the private school of attendance, the aid is to be made payable to the student's "parent or guardian." The Department of Public Instruction (DPI) is directed, however, to "send the check to the private school," and "[t]he parent or guardian shall restrictively endorse the check for the use of the private school." *See id.* § 4006m.

(5) A limitation was placed on the amount of the per student aid payment. A participating school will receive the lesser of the MPS per student state aid or the private school's "operating and debt service cost per pupil that is related to educational programming" as determined by DPI. *See id.* § 4006m.

(6) The limitation that no more than 65% of a private school's enrollment may consist of program participants was repealed. *See id.* § 4003.

(7) A religious activity "opt-out" provision was added. A private school "may not require a pupil attending the private school under this section to participate in any religious activity if the pupil's parent or guardian submits to the pupil's teacher or the private school's principal a written request that the pupil be exempt from such activities." *See id.* § 4008e.

The amendments to the program greatly expand not only the number of students who are allowed to participate, but also the number of private schools in the City of Milwaukee which may now accept students in the program. There are approximately 122 private schools in the city, of which approximately thirty-three are nonsectarian and approximately eighty-nine are sectarian. Approximately 84% of the pupils who attended private schools in the City of Milwaukee during the 1994-95 school year attended sectarian private schools.

The amount of state aid per pupil provided to MPS for the 1995-96 school year was approximately $3667. For the 1996-97 school year, the MPS per student aid amount was approximately $4400. These sums represent an upper limit on the amount of payments per student to private schools for each pupil in the program. The parties stipulated that:

> The tuition charged by at least a majority of the sectarian private schools that notified the Superintendent of Public Instruction of their intent to participate in the [a]mended [program] during the 1995-96 school year is less than the school's per-pupil operating and debt service cost and is less than the per-pupil state aid provided to MPS.

Prior to the injunction which suspended implementation of the amended program, some 4000 MPS pupils had applied to attend private schools under the amended program.

The parties further stipulated that under the amended program:

> [T]he State does not prohibit the participating sectarian private schools from using funds received by the school for any purpose the school deems appropriate, including, among other things, the payment of salaries and expenses of employees affiliated with the school's religious mission, the purchase of literature and other materials identified with the school's religious mission, and the maintenance and construction of facilities used for religious purposes.

Attached to the parties agreed upon statement of facts is an exhibit consisting of some 800 pages of excerpts from handbooks, mission statements, and other written materials prepared by many of the sectarian schools that indicated an intent to participate in the amended program for the 1995-96 school year. Numerous statements extracted from these materials, and quoted in the trial court's written decision and order, indicate that some of the eligible sectarian schools have an overtly religious mission, and that the sectarian aspects of their educational programs are intertwined with the teaching of secular subjects. The following statements are representative:

- "We believe our school exists to carry out the Savior's command to 'go and make disciples' (Matthew 28:19). Consequently, our school's primary reason for existence is to be a tool for bringing young souls to faith in Jesus. . . ." *Exhibit E—Agreed Upon Statement of Facts*, p. 275.
- "First and foremost Garden Homes Lutheran Church conducts and maintains a Christian ele-

mentary school to assist Christian parents in the training and nurturing of their children in the Word of God." *Id.* at 316.

- "In keeping with the purpose of our school, our curriculum is taught in the setting of God's Word. Religion is not only taught as a subject, but our teachers have been trained to integrate God's Word across the curriculum. . . . Our curriculum offerings place Christ as the focal point for all study." *Id.* at 414, 417.

- "The message of Jesus is taught in religion classes and other curricular areas. . . . Because of the nature of a Catholic school, religion is taught daily as part of the curriculum. Catholic values are also incorporated into all other aspects of the curriculum." *Id.* at 614, 617.

- "The Bible forms the core and center upon which all instruction is based. . . . All subjects are taught by a Christian teacher in the light of God's Word, emphasizing God's love for all men through Jesus." *Id.* at 131.

- "We teach all the traditional subjects, but we teach them differently—from a Christian perspective." *Id.* at 526.

The materials from the sectarian schools also indicate that many charge tuition that is hundreds of dollars less than what the schools deem to be their actual cost of educating each student. The difference between the costs incurred for educating students at the sectarian private schools and the tuition charged to parents is generally made up by subsidies from the affiliated parishes and congregations.

c. The Litigation

1. The Parties.

Plaintiffs Warner Jackson, et al., are citizens and taxpayers of the State of Wisconsin. These plaintiffs include parents and members of the clergy from diverse religious and ethnic backgrounds, many of whom have children enrolled in the MPS. They commenced an action challenging the amended program with respect to the inclusion of sectarian private schools. These plaintiffs will be referred to as the Jackson plaintiffs.

Plaintiffs Milwaukee Teachers' Education Association, et al., consist of teachers and other employees of MPS, parents of pupils enrolled in MPS or another public school system in Wisconsin, a member of the clergy, and various organizations that represent the individual plaintiffs. These plaintiffs commenced a separate action challenging the provisions of the amended program, and their action was consolidated with the Jackson plaintiffs' action. These plaintiffs will be identified as the MTEA plaintiffs.

Plaintiffs National Association for the Advancement of Colored People, et al., filed a later, separate action challenging the amended program. The NAACP plaintiffs raised some of the same challenges as the first two plaintiff groups, but brought an additional claim that the amended program also violates the equal protection provisions of the United States and Wisconsin Constitutions. Their action was consolidated with the first two actions, although further proceedings on the equal protection claim were stayed by the trial court. These plaintiffs will be identified as the NAACP.

Defendant John Benson is the Superintendent of Public Instruction for the State of Wisconsin. Defendant Department of Public Instruction (DPI) is the administrative agency of the State through which funding for the Milwaukee Parental Choice Program is directed, and to which are delegated various supervisory and administrative responsibilities with respect to the program. These defendants will be identified as the State.

Intervening defendants Marquelle Miller, et al., are pupils, and the parents of pupils, who seek to participate in the amended program. They were granted leave to intervene and participate as defendants in the action. In addition to defending the amended program against the challenges raised in the consolidated actions, the Miller defendants claim that their rights to freely exercise their religions under the United States and Wisconsin Constitutions would be abridged if the amendments to the program are invalidated. These defendatns will be identified as the Miller defendants.

Annette Polly Williams is a representative to the Wisconsin State Assembly for the Tenth District, in which numerous participants in the program and potential participants in the amended program reside. Representative Williams authored the original program and certain 1995 amendments at issue here. Parents for School Choice is an organization created to mobilize public support for an expansion of the program. Also included as intervenors with this group are parents of pupils who seek to participate in the amended program. These parties were granted leave to intervene as defendants and will be referred to as PSC.

Except where necessary to identify issues or arguments unique to a particular party, all plaintiffs in the consolidated actions will be referred to, collectively, as the Challengers, and all defendants as the State.

2. Procedural History.

The parties filed the two original actions in August 1995. The supreme court then granted leave to commence an original action in that court and entered a preliminary injunction staying the implementation of the amended program, specifying that the pre-1995 provisions of the original program were unaffected. Following oral argument, the supreme court announced that it was deadlocked three to three on the constitutional issues, and it dismissed the

petition, effectively remanding the case to the Dane County Circuit Court for further proceedings. Following remand, the trial court partially lifted the preliminary injunction, thereby allowing all of the 1995 amendments to be implemented *except* participation by sectarian schools.

The parties filed cross-motions for summary judgment. The trial court denied the defendants' motions for summary judgment; granted the plaintiffs' motions for summary judgment; and ordered "the State of Wisconsin . . . to terminate the amended Milwaukee Parental Choice Program," but stayed its order until the close of the 1996-97 school year. Specifically, the trial court concluded that the amended program violates Article I, section 18 of the Wisconsin Constitution because its primary effect "is to benefit the religious missions of the elementary and secondary religious schools and because it compels Wisconsin taxpayers to support places of worship without their consent." The trial court also ruled that the amended program was a private or local bill that had been enacted in violation of the restrictions of Article IV, section 18 of the Wisconsin Constitution.[3] The court further concluded that the amended program, insofar as it included sectarian private schools, violates the Wisconsin public purpose doctrine. Finally, the trial court rejected the claim that the expanded program violates Article X, section 3 of the Wisconsin Constitution.[4] The trial court did not reach the First Amendment claim because it invalidated the amended program on state constitutional grounds.

Defendants appeal the trial court's order terminating the amended program.

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[3] "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." WIS. CONST. art. iv, § 18.

[4] "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable . . . and no sectarian instruction shall be allowed therein . . . ." WIS. CONST. art. x, § 3.

ANALYSIS

We are an error correcting court. *State v. Schumacher*, 144 Wis.2d 388, 407, 424 N.W.2d 672, 679 (1988). Our role is not to pass judgment on the wisdom of the amended program as an instrument of public policy aimed at improving educational opportunities for children from low income families in the City of Milwaukee. Nor is it primarily our role to develop and declare Wisconsin constitutional law regarding the matters argued by the parties in this case. *See Cook v. Cook*, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 255-56 (1997). Rather, our responsibility is to determine whether the trial court reached a result that is consistent with the text of the Wisconsin Constitution, and if necessary, the U.S. Constitution, and with existing precedents interpreting the provisions at issue. We conclude that the trial court reached such a result.

The parties requested that we expedite consideration of this appeal, and we agreed to do so. The parties argued the case shortly after briefing was completed, and this decision is being issued within the month following oral argument. The parties submitted briefs which cumulate to more than 365 pages, not including appendices and the briefs of *amici curiae*. In order to honor our commitment to timely dispose of this appeal, we cannot specifically address each argument raised in the various briefs. To the extent that the Challengers have raised issues or arguments not addressed in this opinion, we have concluded that they are not necessary to our disposition. To the extent that any arguments raised by the State remain unaddressed, we have concluded that those arguments do not persuade us that a different disposition is warranted.

a. Standard of Review.

The order under review grants summary judgment on stipulated facts. The issue is the constitutionality of a state statute. This appeal, therefore, involves questions of law which we decide de novo. *State v. Post*, 197 Wis.2d

279, 301, 541 N.W.2d 115, 121 (1995). The legislative enactment under review enjoys a presumption of constitutionality, and although the issue is one of law, the Challengers are deemed to bear the burden "to prove" the statute unconstitutional "beyond a reasonable doubt." *Id.*, (citation omitted).

The State argues that the present actions mount a "facial" challenge to the amended program because plaintiffs seek to have the 1995 amendments to § 119.23, STATS., enjoined *in toto,* rather than just in certain applications. Thus, the State, citing *United States v. Salerno,* 481 U.S. 739, 745 (1987), argues that the Challengers' burden is to show unconstitutionality in all applications, otherwise the amended program "must be left in place" to the extent that it has constitutional applications. However, except for a footnote suggesting that students might constitutionally attend sectarian private schools where the tuition charged for a non-program student was not exceeded by the state payment for a student in the amended program, the State has not articulated a rationale that would allow us to declare, on this record, that the amended program "must be left in place" as to some applications.

The State's reliance on certain language in *State ex rel. Warren v. Nusbaum* (*Nusbaum II*), 64 Wis.2d 314, 322-23, 219 N.W.2d 577, 582 (1974), for support of its "partial validity" argument is misplaced. The supreme court commented that constitutional infirmities under the statute there held valid "may arise" and would have "to be determined on [] individual facts." *Id.* But this statement follows the court's conclusion that the posture of the case before it, like this one, required it to analyze the claims made as a facial challenge to the statute:

> Since this action is before this court on the pleadings and stipulation of facts, our decision is necessarily limited thereto. Under the facts we can only determine whether [the statute] is unconstitutional on its face.

Id. at 322, 219 N.W.2d at 582.

The amended program is quite specific as to the students and schools that may participate, how funding is determined and paid, and what restrictions and limitations apply. The agreed upon facts, with attachments, describe the sectarian private schools that have stated an intent to participate. The essential contours of the amended program are well established in the record, and it is the constitutionality of the program as described in this record that we must determine. Had the legislature wished to limit the amended program to certain applications it could have done so, but did not. Like the supreme court in *Nusbaum II*, we can only evaluate the program as enacted and as described in the stipulated record before us. *Id.*

b. Article I, section 18 of the Wisconsin Constitution

We begin by analyzing whether the amended program violates the prohibition against state expenditures for the benefit of religious societies or seminaries contained in Article I, section 18 of the Wisconsin Constitution. We do so, first, because the trial court devoted a major part of its analysis to this issue in its decision and order, and the parties have done likewise in their briefs and oral arguments to this court. Second, beginning our analysis with the state constitutional issue enhances the economy of our effort. The Establishment Clause of the First Amendment allows "more flexibility of interpretation" than does Article I, § 18. *State ex rel. Reynolds v. Nusbaum (Reynolds)*, 17 Wis.2d 148, 165, 115 N.W.2d 761, 770 (1962). Thus, a conclusion that the program fails under Article I, § 18 will obviate a separate First Amendment analysis. *See State v. Miller*, 202 Wis.2d 56, 62-66, 549 N.W.2d 235, 238-39 (1996). By the same token, a conclusion that the program passes muster under the state religious benefit clause would compel the same conclusion with respect to the Establishment Clause of the First Amendment, with little, if any, additional analysis being required.

Notwithstanding the fact that the provisions of Article I, § 18 have been deemed by our supreme court to be less flexible than their federal counterparts in the First Amendment, the State argues that we must import and apply federal Establishment Clause jurisprudence to our analysis of the Wisconsin provisions. If we do so, the State claims that we must arrive at the conclusion that the amended program violates neither constitution because its primary effect is to enhance educational opportunities for disadvantaged students, and any benefit to religion is indirect and incidental. While we have no quarrel with the proposition that we may look for guidance to analyses employed by the United States Supreme Court in Establishment Clause cases:

> Some questions cannot be fully illuminated by the light of federal jurisprudence alone, but may require examination according to the dictates of the more expansive protections envisioned by our state constitution.

Id. at 64, 549 N.W.2d at 239.

We thus begin by reviewing the text of Article I, § 18, and proceed next to our supreme court's interpretations of its provisions. Even before other authority is consulted, it is apparent that the authors of the Wisconsin Constitution intended to much more specifically curtail what the State may do in its interactions with religion than did the drafters of the Bill of Rights. In lieu of the court directive to "make no law respecting an establishment of religion, or prohibiting the free exercise thereof" contained in the First Amendment, the state text provides as follows:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of con-

> science be permitted, or any preference be given by law to any religious establishment, or modes of worship; *nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.*

WIS. CONST. art. I, § 18 (emphasis supplied).

That this language goes significantly further than the First Amendment in its prohibition of state support or benefit for religion has been settled law since *State ex rel. Weiss v. District Board of School District No. Eight of the City of Edgerton*, 76 Wis. 177, 44 N.W. 967 (1890), decided some forty years after the adoption of the Wisconsin Constitution:

> Wisconsin, as one of the later states admitted into the Union, having before it the experience of others, and probably in view of its heterogeneous population . . . has, in her organic law, probably furnished a more complete bar to any preference for, or discrimination against, any religious sect, organization or society than any other state in the Union.

Id. at 207-08, 44 N.W. at 977. (The quotation is taken from a concurring opinion of Cassoday, J., to whom the court's opinion delegated the task of addressing Article I, § 18. It "thus represents the opinion of the court." *Reynolds*, 17 Wis.2d at 165 n.3, 115 N.W.2d at 769.) The principle enunciated in this passage from *Weiss* is as valid today as it was a century ago, having been quoted with approval not only by the *Reynolds* court in 1962, but again last year in *Miller*, 202 Wis.2d at 65, 549 N.W.2d at 239.

The *Weiss* court concluded that reading the King James version of the Bible to students attending a City of Edgerton public school violated the "religious benefit" clause of Article I, § 18. The court interpreted "seminary" as used in the state constitution to mean a school, and its concluded further that:

> The thing that is prohibited is the drawing of any money from the treasury for the benefit of any religious school. If the stated reading of the Bible in the school as a text-book is not only, in a limited sense, worship, but also instruction, as it manifestly is, then there is no escape from the conclusion that it is religious instruction, and hence the money so drawn from the state treasury was for the benefit of a religious school, within the meaning of this clause of the constitution.

Weiss, 76 Wis. at 215, 44 N.W. at 980. (The court also held that the Bible readings violated the "compelled support" clause of Article I, § 18, which we discuss below, and the Article X, § 3 prohibition against sectarian instruction in the district schools.) *See id.* at 203-16, 44 N.W. at 976-80.

If reading a Bible to students in the Edgerton Public School converted it into a "religious seminary," for the benefit of which money had been improperly drawn from the state treasury, we fail to see how a different conclusion may be reached with respect to state payments received by sectarian schools under the amended program. The religious missions of many of these schools, and the expressed, purposeful infusion of religion into their curricula, make them religious seminaries within the meaning of Article I, § 18. *See Reynolds,* 17 Wis.2d at 156, 115 N.W.2d at 765 (primary and secondary schools operated by religious organizations or sectarian groups, where some religious instruction is given, are "religious seminaries"). Unless the *Weiss* holding has been narrowed or abandoned, or unless the fact that state checks sent to sectarian schools under the amended program are made payable to the parents of participating students mandates a different result, we are compelled by *Weiss* to invalidate the amended program. As we discuss below, we conclude that the Article I, § 18 analysis in *Weiss* is still good law, and that the amended program cannot be convincingly distinguished.

Our conclusion is fortified by *State ex rel. Reynolds v. Nusbaum,* 17 Wis.2d 148, 115 N.W.2d 761 (1962). The supreme court there reviewed the constitutionality of a state law "to require certain public school boards to furnish transportation to nonpublic school pupils and . . . to require payment of state aids to these school districts on account of such transportation." *Id.* at 150, 115 N.W.2d at 762. The U.S. Supreme Court had previously sustained a similar New Jersey provision against a First Amendment challenge. *See Everson v. Bd. of Educ. of Ewing,* 330 U.S. 1 (1947). The supreme court, however, expressly rejected an invitation to "adopt the construction of [Article I, § 18] of our constitution which the [*Everson* court] placed upon" the Establishment Clause of the First Amendment. *Reynolds,* 17 Wis.2d at 164, 115 N.W.2d at 769. Instead, the court, relying in part on *Weiss*, concluded that the provision of public funds for the transportation of students attending private, sectarian schools violated Article I, § 18. *Id.* at 165-66, 115 N.W.2d at 770.

Although the law reviewed in *Reynolds* referred only to pupils attending "nonpublic schools," the stipulated facts before the court allowed it to conclude that "the private schools which stand to benefit from the act are the parochial schools" and that "the benefit conferred is in reality one confined to those religious groups which operate parochial schools." *Id.* at 158, 115 N.W.2d at 766. The same can be said of the amended program under 1995 Wis. Act 27. Over 70% of the private schools eligible for the amended program are sectarian. The thirty-three nonsectarian schools eligible to participate in the amended program would have been eligible under the original program prior to the enactment of 1995 Wis. Act 27. Whatever benefit to private schools is conferred by the amendments in the Act, is "in reality one confined to those religious groups which operate" the eighty-nine sectarian schools that became eligible to par-

ticipate as a result of the passage of the amended program. *Id.*

The public funds involved in *Reynolds* were not to be paid directly to sectarian schools, or even to these schools by way of restricted payments to the parents of pupils attending them. Rather, the law simply directed public school districts to provide transportation for private school students, via the "regular routes approved for the public school bus," to "the public school which they are entitled to attend." *Id.* at 153 n.1, 115 N.W.2d at 763 (quoting § 40.53(1), STATS., as amended by Laws of 1961, ch. 648). Nonetheless, the *Reynolds* court found a benefit to not only those sectarian schools that were then paying for the transportation of their students, but also to sectarian schools, generally, which stood to "gain through increased enrollment," stating that "an increase in enrollment is a benefit to these parochial schools." *Id.* at 156-57, 115 N.W.2d at 765 (citations omitted).

It seems clear that the sectarian schools participating in the amended program will experience increased enrollment. Except for students below grade 4, students may only participate in the amended program if they were *not* previously attending private schools other than under the program. Section 119.23(2)(a)2, STATS., as amended by 1995 Wis. Act 27, § 4002. The increase from 1500 to 15,000 in the number of pupils allowed to participate, with some 4000 having already applied for participation prior to the suspension of implementation of the amended program, virtually guarantees that many of the eighty-nine sectarian schools eligible to participate in the amended program will experience enrollment increases.

More significant than enrollment increases, however, is the benefit sectarian schools derive from the receipt of state funds which they may expend for any sectarian or nonsectarian educational purpose. These unrestricted payments cannot, under *Reynolds*, be deemed anything other

than a benefit to the sectarian schools participating in the amended program. *See also State ex rel. Warren v. Nusbaum (Nushbaum I)*, 55 Wis.2d 316, 326, 198 N.W.2d 650, 655 (1972) (to be valid, a statute must provide that state payments to sectarian university be used only for secular education). The benefit accrues whether the amount a sectarian school receives for each student enrolled via the amended program is less than or more than the tuition charged for non-program students. In the latter case, of course, an even greater benefit accrues to the religious organization operating the school since the amount of subsidization it must provide to the school is less for a program student than for non-program students.

The State, however, argues that even if it is inescapable that "religious seminaries" are benefited by the expenditure of money drawn from the state treasury under the amended program, it must still be upheld because state and federal precedents, subsequent to *Reynolds,* make it clear that the program is unconstitutional only if a religious benefit is the "primary effect" of the amended program. The State cites the following passage in support of its argument:

> This court has held that ". . . we cannot read [Article I, § 18] as being so prohibitive as not to encompass the primary-effect test. . . ." The applicability of the primary-effect test is to make "[t]he crucial question . . . not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."

Nusbaum I, 55 Wis.2d at 333, 198 N.W.2d at 659 (quoting *State ex rel. Warren v. Reuter,* 44 Wis.2d 201, 227, 170 N.W.2d 790, 802 (1969) and *Tilton v. Richardson,* 403 U.S. 672, 679 (1971)). The State's argument is somewhat undermined at the outset in that, even after applying the "primary effect" test, the *Nusbaum I* court invalidated the enactment under review. Notwithstanding the secular purpose of a legislative act to make dental

education available to Wisconsin residents, since it did not restrict the application of the per student aid paid to Marquette University on behalf of Wisconsin students attending its dental school to secular purposes, the court held the Act was unconstitutional under both the U.S. and Wisconsin Constitutions. *Id.* at 332-33, 336-37, 198 N.W. 2d at 658-61.

Nonetheless, we accept the State's premise that, in reviewing the amended program under Article I, § 18, we may, and perhaps even must, consult United States Supreme Court cases applying the "primary effect" test. This test is the second of three parts of the "*Lemon* test":

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster "an excessive government entanglement with religion."

State ex rel. Warren v. Nusbaum (Nusbaum II), 64 Wis. 2d 314, 322, 219 N.W.2d 577, 582 (1974) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)) (citation and quoted source omitted). Here, as in many Establishment Clause and religious benefit clause cases, the secular purpose of the amended program is virtually conceded: the expansion of educational opportunities for students from low income families in the City of Milwaukee.

No party argues on this appeal that the legislature's "primary purpose" was to funnel money from the state treasury to sectarian schools in Milwaukee; but this does not prevent such an effect of the amended program from being deemed "primary." *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973) (proper legislative purpose does not immunize act from further scrutiny if it has "a primary effect" to advance religion). In *Nyquist*, the Supreme Court invalidated three provisions of a New York law that: (1) made direct

grants of money to private elementary and secondary schools for maintenance and repair of facilities; (2) partially reimbursed low income parents for tuition costs for their children attending private schools; and (3) provided tax deductions or credits to other parents for children attending private schools. *Id.* at 796-98.

The intended New York tuition reimbursement program closely parallels the amended program here under review. The Court concluded that this part of the New York law failed the "primary effect" test, even though state funds were sent to parents instead of directly to private schools, the "great majority" of which (85%) were sectarian. *Id.* at 768, 783. Transmittal of the state aid via the parents was deemed only "one among many factors to be considered" and did not provide "per se immunity" to the program. *Id.* at 781. The Court declined to make what it labeled a "metaphysical judgment[]" as to whether "*the* 'primary' effect" of the tuition reimbursement program was to "subsidize religion" or to promote "legitimate secular objectives." *Id.* at 783 n.39 (emphasis supplied).

Rather, the Court concluded that the "primary effect" test required only that a reviewing court "ascertain whether [a law found to have a 'primary' effect to promote some legitimate end] also has the direct and immediate effect of advancing religion." *Id.* The Court concluded that the tuition reimbursement program failed the test:

> Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools—are certainly unexceptionable, the effect of the aid is un-

> mistakably to provide desired financial support for nonpublic, sectarian institutions.

Id. at 783 (footnote omitted). After completing its review of each of the three facets of the New York law, the Court concluded that:

> [E]ach, as written has *a* "primary effect that advances religion" and offends the constitutional prohibition against laws "respecting an establishment of religion."

Id. at 798 (emphasis supplied).

Since Article I, § 18 provides less flexibility for interpretation than does the Establishment Clause, *Reynolds,* 17 Wis.2d at 165, 115 N.W.2d at 770, we conclude that the "primary effect" test, as applied in *Nyquist,* does not undermine our conclusion that the amended program must be set aside on state constitutional grounds. Participation in the amended program is permitted to rise to 15,000 pupils, and private school participating in the program stand to receive upwards of $4000 per student in state payments. Total state payments under the program could thus approach $60 million. If pupil attendance at sectarian schools under the program follows the percentage of private schools eligible to participate which are sectarian (over 70%), or if it mirrors the percentage of attendance at sectarian schools among private school students in the City of Milwaukee (84%), well over $40 million in state payments could be received by sectarian schools. We thus conclude that "a primary effect" of the amended program is the drawing of money from the state treasury for the benefit of religious schools.

The State argues, however, that federal cases after *Nyquist* have moved away from *Nyquist's* broad interpretation of the "primary effect" test, and it urges us to follow these later cases. We decline to do so for three reasons. First, a present member of the Supreme Court has described the Court's "Establishment Clause jurisprudence" as being in "hopeless disarray," and we do not

disagree. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. ——, 115 S. Ct. 2510, 2532 (1995) (Thomas, J., concurring). Second, the cases the State would have us consult do not encompass facts nearly so close to those before us as did *Nyquist*. *See Mueller v. Allen*, 463 U.S. 388 (1983) (Minnesota tax deduction for educational costs incurred by students attending both public and non-public schools); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (state vocational rehabilitation aid used by a student to pursue religious vocation at a Christian college); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (sign language interpreter provided under Individuals with Disabilities Education Act to deaf student attending sectarian high school); and *Rosenberger*, 515 U.S. 819 (1995) (student fees at public university used to pay for printing of religiously oriented student newspaper).

Third, if we are to look at federal precedents as an aid in interpreting our state constitution, we must consult those which consider facts close at hand to the controversy before us. *Nyquist* is such a case. Even if we were to speculate that a current majority of the U.S. Supreme Court would not endorse *Nyquist's* treatment of the primary effect test, the case remains precedent unless or until it is overruled by the Court. *See Agostini v. Felton*, 117 S. Ct. 197, 2017 (1997) (if U.S. Supreme Court precedent has application in a case but " 'appears to rest on reasons rejected in some other line of decisions.' " lower court should follow controlling case) (quoted source omitted). (In *Agostini*, decided while the parties were briefing this appeal, the Supreme Court overruled its prior decisions striking down laws in New York and Michigan that permitted public school teachers to go into private sectarian school to provide "supplemental, remedial instruction to disadvantaged children on a neutral basis." *Id.* at 2016. The *Agostini* majority, however, left in place a prior ruling that a Michigan program, under which the State utilized and compensated teachers employed by

sectarian schools to provide certain supplemental classes in those schools, violated the Establishment Clause. *Id.* at 2016-17; *see also* 2019 n.1 (Souter, J., dissenting). *See School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 386-87 (1985) (finding "a substantial risk that, overtly or subtly, the religious message [teachers employed by sectarian schools] are expected to convey during the regular schoolday will infuse the supposedly secular classes they teach after school.").

Finally, we note that the trial court also concluded that the amended program violated not only the religious benefit clause of Article I, § 18, but the "compelled support" clause[5] as well. The State is critical of the trial court's analysis because, according to the State, "it turns every violation of the religious benefits clause into a violation of the compelled support clause and thereby violates the fundamental principle of constitutional interpretation that related provisions in a document should be interpreted to avoid redundancy." We disagree. When interpreting a provision in a statute or constitution, it is proper, and perhaps even mandatory, that a court consider the language of the entire section at issue, and even that of related sections. *See State v. Barnes*, 127 Wis.2d 34, 37, 377 N.W.2d 624, 625 (1985).

Even though "only a small fraction of the school hours [were] devoted" to Bible reading in the Edgerton Public School, the *Weiss* court concluded that the practice rendered the school room "a place of worship" within the meaning of Article I, § 18. *Weiss*, 76 Wis. at 213, 44 N.W. at 979. Since "taxpayers of the district, were compelled to aid in the . . . support of the school," the court was "very certain" that use of the school as a place of worship was "expressly forbidden by the constitution of the state." *Id.* at 213-14, 44 N.W. at 279. We conclude

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[5] "[N]or shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent. . . ." WIS. CONST. art. I, § 18.

that the materials in the record describing the missions and methods of many of the sectarian schools eligible to participate in the amended program, show that some of them are at least as worthy of being deemed "places of worship" as was the Edgerton Public School in 1890. (E.g., "The Bible forms the core and center upon which all instruction is based. Each day is opened with a devotion followed by instruction in Christian doctrine and Bible study."). And, as we have noted, the amended program creates the potential for some $40 million or more in revenues generated from Wisconsin taxpayers to flow to these sectarian schools.

We do not find it necessary to find in the compelled support clause a separate and distinct ground for the result we reach. Our reading of that clause, however, consistent with the holding in *Weiss*, lends additional support to our conclusion that the amended program violates Article I, section 18 of the Wisconsin Constitution because it directs the payment of money from the state treasury for the benefit of religious seminaries.

Our conclusion that the amended program must be invalidated derives chiefly from the deletion by 1995 Wis. Act 27, § 4002, of the word "nonsectarian" from § 119.23 (2)(a), STATS. We conclude, however, that all aspects of the amended program, 1995 Wis. Act 27, §§ 4002-4009 must be set aside. No party has asked us to sever any part or parts of the amended program from its remaining provisions. We have not, therefore, pursued a separate treatment of the various amendments to the program made in the Act. *See Waushara County v. Graf*, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992) (appellate court ordinarily will not consider or decide issues not specifically raised on appeal). Had the legislature been aware that the inclusion of sectarian schools would not withstand constitutional review, it may or may not have elected to increase pupil participation in the program, change the computation and administration of payments to partici-

pating schools, or eliminate the percentage enrollment caps and certain of the monitoring and evaluation requirements. *See Burlington Northern, Inc. v. City of Superior*, 131 Wis.2d 564, 580-81, 388 N.W.2d 916, 924 (1986) (invalid provisions may not be severed when it appears legislature intended provisions to be effective as an entirety and would not have enacted valid part by itself). Should the legislature desire to amend the program to allow additional pupils to attend nonsectarian private schools, or to amend the program in other regards, it should be allowed to do so beginning with a clean slate, that being the original program as upheld in *Davis v. Grover*, 166 Wis.2d 501, 480 N.W.2d 460 (1992).

c. The Free Exercise Claim (Miller Defendants)

The Miller defendants claim that the amended program cannot be invalidated because the "religious school access provided by the [amended program] is mandated by" the Free Exercise of the First Amendment. They argue that the original program violated their right to freely exercise their religion because a government created benefit, public funding for attendance at private schools, was conferred in a "discriminatory manner" by excluding attendance at private sectarian schools. We disagree. We fail to see why the original program represents any more of a curtailment by the State of the Miller defendants' free exercise rights than would be the case had the original program not been enacted. *See Brusca v. Missouri ex rel. State Bd. of Educ.*, 332 F. Supp. 275, 279 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972) (state provisions to fund public schools and deny funding for sectarian schools do not violate Free Exercise Clause).

As the Jackson plaintiffs note in their brief, many state and federal programs are subject to prohibitions on the use of public funds for religious purposes. These types of restrictions serve the same function as the "nonsectarian" limitation in the original program. While we may have sympathy, as did the *Nyquist* court, "for the burdens

experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of 'conscience,'" *Nyquist*, 413 U.S. at 788-89, we cannot conclude that the Free Exercise Clause is violated by a limitation designed to ensure compliance with the constitutional constraint that the State not provide a benefit to religious institutions. *Id.*

d. Disposition of Remaining Claims

We have concluded that the trial court did not err in declaring that the amended program violates Article I, section 18 of the Wisconsin Constitution. Accordingly, we, like the trial court, find it unnecessary to address the Challengers' claim that the amended program also violates the Establishment Clause of the First Amendment. By the same token, we decline to address the NAACP's separate claim that the amended program violates the equal protection clauses of the U.S. and Wisconsin Constitutions. The trial court stayed the equal protection claim after it ordered the consolidation of the NAACP action with those of the Jackson and MTEA plaintiffs. The NAACP has argued the claim on this appeal as an alternative ground upon which the amended program might be invalidated. Our disposition makes it unnecessary to address the equal protection arguments. We presume that the NAACP will be permitted to carry forward its arguments should this case engender further review.

We also decline to address the Article IV, § 18 (private or local bill) claim or the claim that the amended program violates Wisconsin's public purpose doctrine, even though the trial court based its invalidation of the amended program in part on these claims. Neither do we find it necessary to review the trial court's conclusion that the amended program survives an Article X, § 3 challenge ("district schools" to be uniform and free of secular instruction). Each of these claims was made regarding the original program and were decided in favor of the State in *Davis v.*

Grover, 166 Wis.2d 501, 480 N.W.2d 460 (1992). The Challengers argue here that the significant expansion in the numbers of pupils and private schools allowed to participate in the amended program; the concomitant increase in state dollars committed to the program; and the elimininations of the private school percentage enrollment caps and of certain monitoring requirements, combine to call into question whether the amended program can continue to withstand the challenges brought in *Davis*.

We defer consideration of whether the amendments to the program are of such a nature and magnitude that the supreme courts conclusions in *Davis* are no longer applicable to the program. Such a review, should it become necessary, is best conducted by the same court that reviewed and sustained the original program. For us to do so here, given our disposition under Article I, § 18, would amount to little more than the rendering of an advisory opinion.

e. The Dissent

The procedural history of this case demonstrates that there can well be fundamental and good faith disagreements among judges when called upon to assess the constitutionality of the amended program. Many, if not most, of the precedents upon which we rely, and others to which we have been referred by the parties, are split decisions of our supreme court and of the U.S. Supreme Court. Chief Justice Rehnquist has noted the difficulty which infuses Religion Clause jurisprudence as follows:

> Differences of opinion are undoubtedly to be expected when the Court turns to the task of interpreting the meaning of the Religion Clauses of the First Amendment, since our previous cases arising under these clauses, as the Court notes, "have presented some of the most perplexing questions to come before this Court."

Nyquist, 413 U.S. at 805 (Rehnquist, J., dissenting) (quoting Justice Powell's majority opinion at 760).

There are three principal reasons why we cannot accept the dissent's result and analysis. First, the dissent's analysis is largely based on the premise that if state payments received by a sectarian school under the amended program are limited to a school's incremental costs relating only to the program students enrolled at the school (and hence, in the dissent's view, the school is not being subsidized for costs it would otherwise have incurred), then the amended program violates neither the federal or state constitutions. We cannot agree with either the premise itself or the reading of the provisions of 1995 Wis. Act 27 which it requires as a condition precedent.

The dissent finds support for its premise in *State ex rel. Atwood v. Johnson*, 170 Wis. 251, 263-64, 176 N.W. 224, 228 (1919), which dealt principally with a public purpose doctrine challenge to the Educational Bonus Law, an act which provided educational assistance to returning World War I veterans. The dissent acknowledges that *Atwood's* treatment of the religious benefit issue is not "lengthy." Dissent at 22. In fact, the entire treatment of the religious benefit issue in the case is confined to the four conclusory sentences quoted in the dissent, a passage devoid of any citation to or analysis of the language of Article I, § 18. We agree with counsel for one of the plaintiff groups, who at oral argument commented that labeling *Atwood* as "obscure" would overstate its prominence in Article I, § 18 jurisprudence.

Moreover, the proposition that the prohibitions of Article I, § 18 are satisfied if a religious institution is simply reimbursed for costs it would not otherwise incur, with no restrictions as to the purposes of the costs to which the reimbursement is applied, is contrary to more recent Wisconsin precedents which more rigorously analyze the religious benefit issue. The *Reynolds* court concluded that increased enrollment at sectarian schools, an

effect it found to flow from public funding for transportation to the schools, by itself, constituted a benefit even if the costs being subsidized had not been previously borne by them. *Reynolds*, 17 Wis.2d at 156-57, 115 N.W.2d at 765. And, in *Nusbaum I*, the supreme court concluded that Article I, § 18 would not be violated by "a proper statute" providing state payments to Marquette University to offset dental education costs for state residents, *Nusbaum I*, 55 Wis.2d at 333-34, 198 N.W.2d at 659, but that such a statute *must* restrict payments to that end and not simply allow the payments to offset "operating costs" of the university. *Id.* at 326, 198 N.W.2d at 655.

The supreme court expressed similiar sentiments in *Nusbaum II*, 64 Wis.2d at 326, 219 N.W.2d at 584, where it upheld the purchase of special education services from religiously affiliated providers because the act in question did not provide "aid to the religious as opposed to the secular activities of the private institutions." Specifically, the court noted:

> [T]he legislature has gone to great lengths to insure that the inculcation of religious tenets shall not take place. [A provision in the act] provides that, upon approval by the state superintendent, the private special educational service must be one: "Whose governing board, faculty, student body and teachings are not chosen or determined by any religious organization or for any sectarian purpose."

Id. at 325, 219 N.W.2d at 583. By contrast, not only are the provisions of 1995 Wis. Act 27 devoid of any similar limitations, but the State has stipulated that, under the amended program:

> [T]he State does not prohibit the participating sectarian private schools from using funds received by the school for any purpose the school deems appropriate, including, among other things, the payment of salaries and expenses of employees affiliated with the school's religious mission, the purchase of literature

and other materials identified with the school's religious mission, and the maintenance and construction of facilities used for religious purposes.

Thus, we disagree with the dissent's conclusion that if the amended provisions are construed to limit state payments to sectarian schools to the incremental costs incurred by the schools in admitting program students, the amended program therefore satisfies Article I, § 18. Even under such a construction, the state dollars received by a sectarian school would underwrite the entire "educational programming" for participating students, without restrictions limiting the application of the funds to secular services. We cannot accept the dissent's view that the religious activity "opt-out" provision of § 119.23(1)(c), STATS., cures the constitutional infirmities of the amended program. Dissent at 31. That some parents of students participating in the amended program may have their children exempted from religious activities at sectarian schools does not alter the fact that money drawn from the state treasury would underwrite precisely those activities for other program students.

Equally untenable, in our estimation, is the dissent's adoption of a narrowing construction of the provisions of 1995 Wis. Act 27 in order to preserve it constitutionality. The dissent would have us read the amended program provisions to limit state payments to only "the cost for educational programming related solely to the Parental Choice students." Dissent at 15. The statutory language in question provides that the state funding per student must not exceed "an amount equal to *the private school's operating and debt service cost per pupil* that is related to educational programming, as determined by [DPI]." Section 119.23(4), STATS., as amended by 1995 Wis. Act 27, § 4006m (emphasis supplied). The language of the Act cannot sustain the dissent's proposed construction. A limitation on the per pupil cost reimbursement to those costs associated solely with the admission of program stu-

dents is not to be found in § 4006m, nor in any other provision of the amended program.

None of the parties to this appeal have proposed the construction urged by the dissent, nor have they argued that the reimbursable cost provision applicable to the amended program is ambiguous, as the dissent concludes. In fact, the parties demonstrated a shared understanding of the reimbursable cost provision when they stipulated that under the amended program, "tuition charged by at least a majority of the sectarian private schools that notified the [State Superintendent] of their intent to participate in the amended MPCP during the 1995-96 school year is less than the schools' per-pupil operating and debt service cost." While this court may do so, we have no duty to consider any issues other than those presented to us, and we create " 'real problems [by] addressing unmade claims and developing arguments for one side to a dispute.' " *Swatek v. County of Dane*, 192 Wis.2d 47, 52 n.1, 531 N.W.2d 45, 47 (1995) (quoted source omitted).

Moreover, we are not free to judicially re-write a plainly worded statute in an effort to preserve its constitutionality. *State v. Hall*, 207 Wis.2d 54, 82-84, 557 N.W.2d 778, 789-90 (1997). The dissent does not analyze the per pupil cost reimbrsement provision of the amended program in light of its scope, legislative history, context, subject matter and purpose, which is our customary approach when we deem a statute to be ambiguous. *See Pabst Brewing Co. v. DOR*, 130 Wis.2d 21, 294-95, 387 N.W. 2d 121, 122 (Ct. App. 1986). Rather, the dissent simply declares that the provision "describes only the costs participating schools incur due to educating the Parental Choice students." Dissent at 16. We conclude that we cannot adopt the construction of the Act urged by the dissent, because to do so would require that we "go beyond the province of legitimate construction to save it, and where the meaning is plain, words cannot be read

into it or out of it for the purpose of saving" the amended program. *Hall*, 207 Wis.2d at 82, 557 N.W.2d at 789 (citations omitted).

Our second major difference with the dissent's approach is that, by beginning with an analysis of federal Establishment Clause jurisprudence and resting its conclusions regarding Article I, § 18 on that analysis, the dissent obliterates the separate identity and vitality of the religion clauses of the Wisconsin Constitution. We fear that the dissent's approach repeats this court's error in *State v. Miller*, 196 Wis.2d 238, 538 N.W.2d 573 (Ct. App. 1995), of "overreading" *King v. Village of Waunakee*, 185 Wis.2d 25, 517 N.W.2d 671 (1994). *See State v. Miller*, 202 Wis.2d 56, 62-66, 549 N.W.2d 235, 238-39 (1996). We recognize that *Miller* involved a "freedom of conscience" claim, but the supreme court did not limit its disavowal of this court's conclusion that Article I, § 18 must be construed in the same manner as the First Amendment, to the conscience clauses of § 18. The supreme court's express endorsement of the principles in *Weiss* and *Reynolds*, moreover, demonstrates once more that our supreme court deems the provisions of Article I, § 18, including the religious benefit clause, to be separate and distinct from, and less flexible than, its federal counterparts. *See Miller*, 202 Wis.2d at 65-66, 549 N.W.2d at 239. Thus, unlike the dissent, but as we were instructed by the supreme court in *Miller*, we rest our conclusions on the language of Article I, section 18 of the Wisconsin Constitution.

Finally, we believe that the dissent misinterprets certain aspects of our analysis. The dissent asserts that we have made a factual finding, based on certain excerpts from the stipulated record, that religiously affiliated schools intending to participate in the program will purposefully infuse religion throughout their educational programs. Dissent at 29. The dissent goes on to cite excerpts from the record tending to show that some of the eligible sectarian

schools do not necessarily do so, and that they provide excellent education to their students in secular subjects.

We have two responses to these assertions. First, we did not state, or even imply, that the overtly religious purposes and methods espoused by certain of the eligible sectarian schools were incompatible with excellence in the secular aspects of their programs. Second, and more importantly, the constitutional concern is that nothing in the language of the amended program restricts participating schools from using state funds to support the religious aspects of the curricula at sectarian schools, regardless of whether those aspects are a major or minor part of the educational programming.

On the record presented, it is clear that within the array of schools intending to participate in the amended program, there are those which emphasize their religious mission and methods. While it may be difficult to conceive of a non-secular approach to teaching mathematics, it is not so difficult to envision that history, social studies, or even certain of the natural sciences could be taught from a sectarian perspective. Just as we may not presume that all students participating in the amended program will receive pervasively religious instruction in all areas, neither may we conclude that participaton will be limited to those schools whose approach is "less religious." The problem is that nothing in the language of the amended program ensures that state funding will flow only to the latter and not the former, even if statutory language could be devised that would not run afoul of "entanglement" concerns.[6]

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[6] We did not reach the third, or "entanglement," prong of the *Lemon* test because of our conclusion that the guidance provided under the Establishment Clause analysis in *Nyquist* shows that the amended program fails the second, or "primary benefit" test. If this case turns on "how much religion" infuses the educational programming at participating sectarian schools, as the dissent implies, then the third of the *Lemon* tests would be implicated. *See State ex rel. Warren v. Nusbaum (Nusbaum I)*, 55 Wis.2d 316, 329, 198 N.W.2d

Finally, we disagree with the dissent's characterization of our application of the compelled support clause. We do not rely on that clause as a separate and distinct ground for our holding. Rather, as we stated, we conclude that it is not only appropriate, but perhaps mandatory that we review all of the language of Article I, § 18 to aid us in our interpretation of the religious benefit clause. The compelled support clause, as it was interpreted in *Weiss*, supports our conclusion that the amended program violates the prohibition of § 18, that money not be drawn from the treasury to benefit a religious institution. (We did not, as the dissent implies, conclude that the compulsory attendance prohibition was violated, but rather the compelled taxpayer support aspect of the clause.)

CONCLUSION

For the reasons discussed above, we affirm the trial court's order declaring 1995 Wis. Act 27, §§ 4002-4009, to be in violation of Article I, section 18 of the Wisconsin Constitution.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

650, 657 (1972) (footnote omitted) ("[e]ntanglement . . . is not a matter of [] accounting reports or budgetary controls, but rather surveillance to make sure that religion is not intermixed with the purpose served by state aid.").

ROGGENSACK, J. (*dissenting*). While the majority opinion obviously entailed much thought and effort, I believe its analysis of the constitutional questions presented by this appeal led to an erroneous conclusion, in part because it did not undertake an analysis of the Milwaukee Parental Choice Program (Parental Choice) under the Establishment Clause of the First Amendment before examining Parental Choice under the Wisconsin Constitution. If the majority had done so, I am confident it would not have concluded that Establishment Clause jurisprudence was in "hopeless disarray." Rather, it would have recognized that it provides a well articulated guide, directing where the policies that underlie the Establishment Clause are related to the issues presented by each challenge. To begin the Article I, § 18 analysis in this case with an examination of the Establishment Clause, permits a thorough comparison of the constitutional issues presented by Parental Choice with the standards of jurisprudence necessary to an effective review. Because I conclude that Respondents have failed to meet the burden to prove Parental Choice unconstitutional beyond a reasonable doubt, I must respectfully dissent.

DISCUSSION

First Amendment.[1]

"Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof." So begins the First Amendment to the United States Constitution, with words so simple to repeat, but so difficult to interpret.[2] The Establishment Clause and the Free Exercise Clause may both bear on the same state conduct. As the United States Supreme Court has repeatedly recognized, there is a tension within the religion clauses of the First Amendment itself. The Free Exercise Clause[3] and the Establishment Clause are both written in absolute terms, yet it is impossible to completely permit the former without offending the latter. *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973). As a consequence of this internal tension, states which legislate in this area are required to maintain an attitude of neutrality which neither advances nor inhibits religion. *Id.* As the Court explained, "[T]he basic pur-

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[1] The trial court granted summary judgment to the Respondents without addressing the First Amendment challenges. The majority opinion does so as well. However, because I conclude that Parental Choice violates neither the First Amendment of the United States Constitution nor the Wisconsin Constitution, and because a thorough explication and understanding of Establishment Clause jurisprudence is essential to a proper analysis of Parental Choice under Article I, § 18 of the Wisconsin Constitution, it is addressed in this dissent.

[2] The Establishment Clause of the First Amendment has been made binding on the states by the Due Process Clause of the Fourteenth Amendment. *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 761 n.3 (1973).

[3] The Miller defendants base their participation in this lawsuit on the Free Exercise Clause when they argue that without the inclusion of sectarian schools in Parental Choice, their First Amendment rights are violated. Because I conclude that the Milwaukee Parental Choice Program which permits education in a sectarian school is constitutional, I do not reach their argument.

pose of these provisions . . . is to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 669 (1970).

1. Evolution of Establishment Clause Jurisprudence.

As in many areas of the common law, Establishment Clause jurisprudence has developed through years of court decisions which make specific that which the Constitution provides only in general terms. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court set out the general structure of the analysis which it has used in Establishment Clause cases since *Lemon*:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."[4]

Id. at 612-13 (citations omitted). However, while the principles enunciated in *Lemon* remain well settled, the explication of those principles in varying factual situations shows that a bright line test for Establishment Clause challenges is not possible. In part, this is true because our nation's history has never been one in which the church and the state were completely and absolutely separated. As Justice Powell points out in *Nyquist*, "[i]t has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence cases arising under these Clauses have presented some of the most perplexing questions to come before this Court." *Nyquist*, 413 U.S. at 760. What the First Amendment requires by way of analysis is a careful examination of the law challenged on establishment grounds to determine whether it furthers the three evils which the Establishment

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[4] This form of analysis will hereinafter be referred to as "the *Lemon* test," with the recognition that is provides a framework for the constitutional analysis of varying issues.

Clause was designed to prevent: state financial support of religion, state sponsorship of religion and the active involvement of the state in religious activity. *Walz*, U.S. at 668.

There have been numerous Establishment Clause challenges to state laws touching upon education. As those challenges have arisen in the context of varying factual patterns, the general contours of the *Lemon* test have been defined more clearly. For example, in *Mueller v. Allen*, 463 U.S. 388 (1983), the Court dismissed a challenge to a Minnesota statute which allowed a deduction for state income taxes for the expenses that parents of school children actually incurred[5] for textbooks, tuition and transportation. It was acknowledged that the great bulk of the deductions would go to the parents of those students who attended private schools because public school students were provided free textbooks, tuition and generally free transportation as well. Additionally, ninety-five percent of the private school students attended schools that were sectarian. *Id.* at 391.

The secular legislative purpose of ensuring that the state's citizenry be well educated was clear in *Mueller*. Therefore, the bulk of the Court's decision focused on the second element of the *Lemon* test, that of determining whether the principal or primary effect of the statute was one which neither advanced nor inhibited religion. At the start of its analysis, the Court confirmed that, "[o]ne fixed principle in this field is our consistent rejection of the argument that 'any program which in some manner aids an institution with a religious affiliation' violates the Establishment Clause." *Mueller*, 463 U.S. at 393 (citation omitted). Key to the Court's upholding the constitu-

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[5] This question was reserved in *Nyquist* where the payments to parents were not based on the actual expenses they incurred, but instead were pre-set stipends "occasioned by the growing financial plight of such nonpublic institutions." *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 792 (1973).

tionality of the statute was it religious neutrality, where the beneficiaries of the statute were defined on a religiously neutral ground (*i.e.*, school children) and where no state payments were made directly to any religious schools. The Court recognized that financial assistance provided to parents would ultimately have some economic effect comparable to that of state aid given directly to the schools attended by their children, but it found decisive that the only way in which those sectarian schools could benefit was as the result of "private choices of individual parents of school-age children." *Id.* at 399. Therefore, removing the state from the decision making process about whether the children would attend sectarian institutions was material to avoiding the three evils the First Amendment was designed to prevent.

In *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986),[6] a challenge was made to permitting a particular student to participate in a program which provided public funds for special education and/or training in a profession, business or trade, in order to assist visually handicapped persons overcome vocational handicaps and to obtain the maximum degree of self-support and self-care of which they were capable. Witters was suffering from a progressive eye condition which made him eligible under the act, but he was attending Inland Empire School of the Bible, a private Christian college in Spokane, Washington where he studied the Bible, ethics, speech and church administration in an effort to equip himself for a career as a pastor, missionary or youth director. The state denied him assistance because the monies that would have been provided would have passed through him to a religious school. Witters brought suit in state court for a review of the administrative decision denying him aid.

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[6] The scholastic aid survived an Establishment Clause challenge, but on remand, the Washington Supreme Court held it unconstitutional under the state constitution. *Witters v. Washington Dep't of Servs. for the Blind*, 771 P.2d 1119 (Wash. 1989), *cert. denied*, 493 U.S. 850 (1989).

When the state courts affirmed the denial of aid, he appealed to the Supreme Court, which reversed. Justice Marshall, writing for the Court, began with the same basic principle used in *Mueller* when he stated that:

> It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier, and the State may do so even knowing that the employee so intends to dispose of his salary.

Id. at 486-87. The Court also stated that on the other hand, a state may not give a "direct subsidy" to a religious school. The Court defined the question presented in *Witters* as whether the extension of the aid to Witters and then his use of that aid to support his religious education was a permissible transfer similar to the hypothetical salary donation or an impermissible "direct subsidy." *Id.* at 488. The Court concluded that the only way that a religious institution would benefit from the aid given to Witters would be through Witters' personal choice, because the State of Washington's program was made generally available without regard to the sectarian/nonsectarian, or public/non-public nature of the school at which the aid would be spent. Additionally, the Court concluded that giving money to Witters was in no way an incentive for him to undertake a sectarian education. *Id.*

Justice Powell, who was the author of *Nyquist* and concurred in *Witters*, concisely set forth his understanding of the test to be used when evaluating whether the principal or primary effect of payments made to citizens was actually state advancement of religion when he stated that, "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v.*

Kurtzman test, because any aid to religion results from the private choices of the individual beneficiaries." *Id.* at 490-91 (Powell, J., concurring). And, in her concurring opinion, Justice O'Connor reiterated that the aid to religion at issue in *Witters* was solely the result of a private choice. The conclusion that a private choice controlled the use of the state aid was important to her because, "[n]o reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief." *Id.* at 493 (O'Connor, J., concurring) (citations omitted). And, it is the State's promotion or restriction of religious practices which the Establishment Clause proscribes, not those of private individuals.

In *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), the Supreme Court reviewed Arizona's refusal to provide a sign-language interpreter to a deaf student who attended a private Roman Catholic high school in Tucson, Arizona. Under federal law, and state law, Zobrest would have been entitled to an interpreter as a result of his disability. However, his request was denied because the state concluded that to provide Zobrest with an interpreter in a Catholic high school would run afoul of the Establishment Clause.

In addressing the issues for the Court, Chief Justice Rehnquist began again with a premise similar to those asserted in *Witters, Muellar* and *Nyquist* when he stated:

> We have never said that "religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." . . . . [W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Zobrest, 509 U.S. at 8 (citations omitted). When the Court applied the *Lemon* test, it concluded the statute was motivated by a valid secular purpose. In analyzing the second prong of *Lemon* which requires that the principal or primary effect of the law neither advance nor inhibit religion, it reasoned that the statute provided a benefit to a class (deaf children) that was not measured by religious preference, or lack thereof, and that any benefit which a religious school would receive occurred only after Zobrest's parents chose of their own free will to place him in a pervasively sectarian environment. *Id.* at 13. Therefore, it was not the state that was endorsing religion, but Zobrest and his parents. Additionally, the Court concluded that providing an interpreter did not indirectly finance religious education by relieving the sectarian school of costs it otherwise would have borne in educating its students. *Id.* at 12.

In *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 115 S.Ct. 2510 (1995), an Establishment Clause challenge was again made in an educational setting. There, the University of Virginia had collected fees and established a Student Activities Fund from which student groups who published newspapers or magazines could retrieve their publication costs. However, a student organization, Wide Awake Productions, which would have been otherwise entitled to publication monies from the Student Activities Fund, was denied those monies because it published a newspaper with a Christian point of view. Wide Awake Productions challenged the University's decision and the Supreme Court agreed with Wide Awake Productions. It held that the University and the courts below had erred by:

> focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient. If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian pur-

> poses, then *Widmar*[7], *Mergens*[8], and *Lamb's Chapel*[9] would have to be overruled.

Rosenberger, 115 S.Ct. at 2523. In so holding, the Supreme Court clarified that the benefit received by the recipient must be one that does not inhibit or promote religion and that what the student does with that benefit, even if it is to spend 100% of it on religion-related expenditures, as in *Witters* and *Rosenberger*, does not violate the Establishment Clause. This holding is bottomed on the understanding that forbidding the recipient of the benefit from spending it according to his own personal beliefs would not be religion neutral, but instead would convey a state-approved hostility toward religion. As Justice O'Connor explained:

> [It] would leave an impermissible perception that religious activities are disfavored: "the message is one of neutrality rather than endorsement, if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." . . . Neutrality, in both form and effect, is one hallmark of the Establishment Clause.

Id. at 2525 (O'Connor, J., concurring) (citation omitted).

The most recent Supreme Court pronunciation on an Establishment Clause challenge in an educational context is found in *Agostini v. Felton*, 117 S.Ct. 1997 (1997).

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[7] *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that exclusion of religious groups from university's open forum policy violated the First Amendment).

[8] *Board of Educ. of Westside Community Sch. (Dist. 66) v. Mergens*, 496 U.S. 226 (1990) (holding high school which allowed student secular non-curricular activities to meet on school property was required to provide equal access to a Christian student group).

[9] *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding school district violated First Amendment when it denied church use of public school facilities to show film series, solely because it presented a religious view of family values).

There, the Supreme Court overruled its holding in *Aguilar v. Felton*, 473 U.S. 402 (1985), and a portion of its holding in *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), when it held that public school teachers could provide remedial education, guidance and job counseling to eligible students within the confines of private schools, ninety percent of which were sectarian, without contravening the Establishment Clause. In so doing, the Court re-examined the following presumptions which had been operational in *Aguilar* and *Ball*:

> [That] (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking.

Agostini, 117 S.Ct. at 2010.

The Court concluded that those presumptions were no longer valid because the Court's "understanding of the criteria used to assess whether aid to religion has an impermissible effect" had changed. *Id.* First, it concluded that allowing state-paid teachers to work in parochial schools does not always result in the impermissible effect of state-sponsored indoctrination, nor does it always constitute a symbolic union between church and state. *Id.* Rather, the neutral eligibility criteria ensure that believers and nonbelievers are treated equally under the statute. Second, the Court discarded the rule that all government aid that "directly aids" the educational functions of religious schools is presumptively invalid. It concluded that when the religious institution is able to benefit from the state program only as the result of an independent choice of a citizen who is eligible for the program, the Establish-

ment Clause is not contravened. *Id.* at 2011 (citation omitted). Third, the Court will no longer presume that when aid is provided to students at the schools of their choice, those services relieve the sectarian school of costs it would otherwise have had to spend in educating its students, even without the program under challenge. *Id.* at 2011-12. Fourth, the constitutionality of an aid program does not depend on the number of sectarian school students who will receive otherwise neutral aid under the program. *Id.* at 2013.

The Court concluded that Establishment Clause analyses should focus on the criteria used by the state to identify the beneficiaries of an aid program because they are relevant to whether the program subsidizes religion and also to whether the criteria create a financial incentive for the recipient to undertake religious education. *Id.* at 2014. The Court reasoned that an "incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.*

2. Milwaukee Parental Choice Program.

Parental Choice was enacted to broaden the educational opportunities and increase learning for students from lower-income Milwaukee families because these students were among the lowest academic achievers in the state. The beneficiaries of Parental Choice are defined by the economic circumstances and geographic location of the family in which a school-aged child is found. In order to be eligible to participate, child's family may have income no greater than 175% of the poverty level as determined by the federal office of management and budget, reside in Milwaukee; and be otherwise eligible to attend kindergarten through grade twelve.[10]

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[10] For a complete detail of the criteria, see § 119.23, STATS.

Participating private schools may be sectarian or non-sectarian. They must select their students for the program on a random basis, except that they may give preference to siblings of pupils already accepted. The participating schools must be located in Milwaukee and meet all the requisite state and federal laws and codes for accreditation. The private schools cannot require pupils attending under the program to participate in any religious activity. That choice is left to the parents. The parents of participating students are paid "an amount equal to the private schools' operating and debt service cost per pupil that is related to educational programming, as determined by the department," [11] limited by the perpupil amount to which the public school district is entitled under § 121.08, STATS. The checks are sent to the parent's choice of schools and can be cashed only for the cost of the pupil's "educational programming, as determined by the department." Section 119.23(4), STATS.

The case at hand presents a facial challenge to the constitutionality of Parental Choice because it seeks to strike down all possible applications of the act which created it. *Bowen v. Kendrick*, 487 U.S. 589, 600 (1988). Therefore, Respondents must establish, beyond a reasonable doubt, that there are no possible applications or interpretations of the statute which would be constitutional. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Because the trial court granted summary judgment to the Respondents, there must also be no issues of material fact in dispute. *Lisa R.P. v. Michael J.W.*, 210 Wis.2d 132, 141, 565 N.W.2d 179, 183 (Ct. App. 1997).

This Establishment Clause analysis begins by applying the *Lemon* test. Parental Choice easily satisfies the first prong, with the secular purpose of improving the academic achievement for children from lower-income families.

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[11] The amounts payable under the program are determined by the Department of Public Instruction.

However, the major concerns about the constitutionality of Parental Choice center on the second prong of the *Lemon* test.

The Respondents maintain the statute fails the primary effect analysis of *Lemon*, and thereby violates the Establishment Clause. Respondents assert Parental Choice provides "direct" support to a religious activity, even if the statute were construed to be facially neutral [12] and to have a secular purpose. The Appellants counter that any support received by a religious school is "indirect" because an independent choice by a student's parent is a condition precedent to a religious school's receipt of money; and therefore, the program is constitutional. To which Respondents reply, that even indirect support may contravene the prohibitions of the Establishment Clause.

My analysis of the second prong of the *Lemon* test begins with a recogniton of the basic principles of Establishment Clause jurisprudence which are relied on in *Agostini, Witters, Mueller* and *Nyquist*. First, merely because a social welfare program in some manner aids an institution with a religious affiliation, it does not necessarily follow that the program is unconstitutional. Second, the class benefitted must be described without reference to religion. Third, the nature of the benefit provided must neither be hostile to religion nor provide a religious incentive. In applying the primary effect test, I utilize the directive of Justice Powell that, "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries." *Witters*, 474 U.S. at 490-91. *See also Agostini*, 117 S.Ct. at 2011-12 and 2014.

Here, the class of beneficiaries is defined by the income levels of the students' families and the geographic loca-

[12] The Respondents do not concede Parental Choice is neutral.

tions in which the students reside. As set out in the statute, the beneficiaries comprise a neutral classification that has no reference to religion. The nature of the benefit provided is the opportunity for additional educational choices for the parents and students of lower-income families. The benefit neither promotes religion nor is hostile to it. Rather, it promotes the opportunity for increased learning by those currently having the greatest difficulty with educational achievement. In so doing, the State leaves the choice of the site of each child's education to his/her parents. It is constitutionally permissible under current Establishment Clause jurisprudence for parents to choose a religious education for their children, even when they are receiving financial payments from the State to fund that choice. *Zobrest*, 509 U.S. at 13; *Mueller*, 463 U.S. at 399. As the Court held in *Witters*, the Establishment Clause is not violated merely because money previously in the possession of a state is conveyed to a religious school. A parent's choice to send his or her child to a religious private school and thereafter to transfer the monies provided under the program to that school does not run afoul of the First Amendment. *See Mueller*, 463 U.S. at 399; *Witters*, 474 U.S. at 486-87; *Rosenberger*, 115 S.Ct. at 2523; *Agostini*, 117 S.Ct. at 2016.

Furthermore, just because the majority of the schools which have applied to participate in Parental Choice are sectarian schools, it does not necessarily follow that the statute is unconstitutional. As the Supreme Court reasoned in *Agostini:*

> Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid. *Zobrest* did not turn on the fact that James Zobrest had, at the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school.

> Accord, *Mueller v. Allen*, 463 U.S. 388, 401, 103 S.Ct. 3062, 3070, 77 L.Ed.2d 721 (1983) ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.").

Agostini, 117 S.Ct. at 2013, *citing Mueller*, 463 U.S. at 401.

However, repeatedly in cases from *Nyquist* and *Agostini*, the Court's analysis involves consideration of whether the state payments actually supplant costs the sectarian schools would have incurred, even without the program under challenge. Therefore, I consider this factor as well. Section 119.23(4), STATS., provides for state payments to parents equal to the "cost per pupil that is related to educational programming," so long as that cost is not more than the per-pupil payment received by Milwaukee Public Schools. However, § 119.23(4) is ambiguous because it is capable of being understood by reasonably well-informed persons in at least two ways. *D.S. v. Racine County*, 142 Wis.2d 129, 134, 416 N.W.2d 292, 294 (1987). The words "cost per pupil that is related to educational programming, as determined by the department" could mean the cost for the educational programming related solely to Parental Choice students, or the phrase could mean the cost for the educational programming for all students in a given private school divided by the number of students in that school.[13] The record does not reflect whether the latter construction would result in a larger payment to the parents, which they would then spend at a participating school, than would the former construction. And, *Agostini*

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[13] The latter interpretation was urged by counsel for the Jackson plaintiffs at oral argument. Counsel for Parents for School Choice opined that Parental Choice is a remedial program, and it is only the costs the schools incur in providing those services that are paid to the parents.

teaches that courts are no longer free to presume that when aid is provided to students who attend religious schools those monies are supplanting costs the school would have had, even without the program at issue. *Agostini,* 117 S.Ct. at 2013. However, to the extent that such a construction would result in a larger payment that would supplant costs which the schools would have incurred, even without participating in Parental Choice, it must be avoided. This is consistent with the basic maxim of statutory construction which requires that a facial challenge to a statute will not succeed when a limiting construction is available that will maintain the legislation's constitutional integrity. *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973).

> It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be "readily susceptible" to a narrowing construction that would make it constitutional, it will be upheld.

Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397 (1988). Therefore, I conclude that § 119.23(4), STATS., describes only the costs participating schools incur due to educating Parental Choice students.[14]

I also conclude that Parental Choice passes the third prong of the *Lemon* test because the program does not require excessive state entanglement with religion under the standards established in *Agostini.* Parental Choice requires the Department of Public Instruction to determine the amount of the payment parents will receive, to confirm that the participating schools have complied with all the requisite laws and codes and that they select pupils on a random basis, exclusive of siblings already admitted, and

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[14] This interpretation does not preclude the State from paying *less* than this amount, as indicated by the financial caps stated in the statute.

to monitor student performance. The Legislative Audit Bureau will also perform a financial and performance evaluation audit of the program. All are tasks that will not involve the State in the religious teachings at any sectarian school. And, no Respondent argued that the statutory responsibilities of the State result in constitutional infirmity under the third prong of the *Lemon* test.

The majority contends that *Nyquist* is the Establishment Clause case whose facts most closely resemble Parental Choice; and therefore, *Nyquist,* not more current jurisprudence, determines the outcome in this case. I disagree for two reasons. First, Establishment Clause jurisprudence is an evolving legal concept, where the outlines of the structure necessary to an effective analysis of a constitutional challenge are sharpened and clarified through successive court decisions. Therefore, *Nyquist* must be interpreted and applied with current Establishment Clause jurisprudence in mind. Second, *Nyquist* is factually distinguishable in ways the United States Supreme Court has found significant.

Nyquist examined an act which provided stipends to lower-income families who sent their children to private schools. The stipends were capped by a percentage of the tuition paid, but the amount received was tied to whether the child attended elementary or secondary school, not to the amount the parent paid for tuition. It also provided for tax deductions for higher-income families who did not qualify for the stipends. The deductions were also unrelated to tuition actually paid. The nonpublic schools were characterized by the Court as those which could.

> (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the re-

> ligious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach.

Nyquist, 413 U.S. at 767-68. In striking down the stipends and tax deductions, the Court concluded that the act had made no effort to maintain a separation between secular and religious educational functions at the private schools. Additionally, it concluded that because the act provided unrestricted cash for the families to use, the stipends and tax deductions operated as impermissible "incentives" that provided "encouragement" to parents to send children to religious schools. *Id.* at 785-86, 791.

By contrast, Parental Choice made significant efforts to separate the secular and religious aspects of the participating schools when it stated that no student was required to participate in *any religious activity* and that the schools were required to select students on a random basis, giving preference only to siblings of students already in attendance. Additionally, the record does not reflect that there is any religious component to hiring of faculty for Parental Choice schools. And finally, the payments received by the parents of Parental Choice students are directly tied to the cost to the school of educating Parental Choice students. Therefore, parents' use of the funds is restricted, providing no incentive for parents to send their children to sectarian schools.

In summation, I conclude Parental Choice does not violate the Establishment Clause of the First Amendment because it offers educational assistance to a class of persons (children from lower-income families) defined without reference to their religion; it provides a benefit (increased educational opportunity) that is religion neutral; any monies which eventually reach a religious institution do so only after an independent choice by a parent; and

the payments made do not subsidize religious institutions for costs they would have incurred, even without participating in Parental Choice.

Wisconsin Constitution.

1. Article I, § 18.

Article I, § 18 of the Wisconsin Constitution formed two bases for the majority's conclusion that Parental Choice was unconstitutional, the benefit clause and the compelled support clause. Article I, § 18 states in relevant part:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

It contains constitutional guarantees of several personal liberties bottomed on the idea of religious freedom.

Often when a statute is challenged on religious freedom grounds, it is challenged under both the First Amendment and Article I, § 18. When that occurs, the Wisconsin Supreme Court has repeatedly stated that, "[w]hile words used may differ, both the federal and state constitutional provisions relating to freedom of religion are intended and operate to serve the same dual purpose of prohibiting the 'establishment' of religion and protecting the 'free exercise' of religion." *State ex rel. Warrent v. Nusbaum*, 55 Wis.2d 316, 332, 198 N.W.2d 650, 658 (1972)[15] (where the *Lemon* test was first employed by a Wiscon-

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[15] This case will be referred to hereinafter as *Nusbaum I*.

sin appellate court in its Establishment Clause analysis); *State ex rel. Warren v. Nusbaum*, 64 Wis.2d 314, 328, 219 N.W.2d 577, 584 (1974);[16] *King v. Village of Waunakee*, 185 Wis.2d 25, 53-54, 517 N.W.2d 671, 683 (1994).

However, the quoted statements do not mean that the protections afforded by Article I, § 18 are identical in all respects to those provided by the First Amendment. *State v. Miller*, 202 Wis.2d 56, 65-66, 549 N.W.2d 235, 239 (1996). And, even though it has been held that if a First Amendment provision involving religious freedom is violated, Article I, § 18 of the Wisconsin Constitution is also violated, *Nusbaum I*, 55 Wis.2d at 333, 198 N.W.2d at 659, it does not always follow that if the First Amendment has *not* been violated, Article I, § 18 has *not* been transgressed. *Miller*, 202 Wis.2d at 65-66, 549 N.W.2d at 239.

Miller, which involved a free exercise of religion challenge brought by members of the Old Order Amish faith, is an example of a difference between First Amendment jurisprudence and Article I, § 18 juriprudence. In analyzing their claim under the Wisconsin Constitution, the Court acknowledged federal law and its past relationship to free exercise challenges under Article I, § 18, but decided not to use the current federal analysis for a free exercise challenge and instead retained the compelling state interest/least restrictive means analysis formerly used in free exercise challenges under the First Amendment.[17] However, it did not create a bright line and hold that *all* challenges to alleged restrictions of religious freedom *must always* be analyzed differently from the anal-

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[16] This case will be referred to hereinafter as *Nausbaum II*.

[17] In 1990, the United States Supreme Court stopped using the compelling state interest/least restrictive means test in cases bottomed solely on a Free Exercise Clause challenge. *Employment Div., Oregon Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).

yses used with parallel challenges under the First Amendment. Rather, it held that:

> *Some* questions cannot be fully illuminated by the light of federal jurisprudence alone, but may require examination according to the dictates of the more expansive protections envisioned by our state constitution.

Id. at 64 (emphasis added). The analysis used in *Miller* is appropriate for a free exercise challenge, but it is not applicable to the benefit clause and compelled support clause challenges at issue here. Therefore, I examine those challenges using the analytical framework designated by the Wisconsin Supreme Court for the benefit clause and the compelled support clause.

a. Benefit Clause.

The Respondents' benefit clause challenge, at least in some respects, parallels as Establishment Clause challenge under the First Amendment. The benefit clause states: "[N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." [18]

State ex rel. Atwood v. Johnson, 170 Wis. 218, 176 N.W. 224 (1919), addresses a benefit clause challenge in an educational context.[19] There, the Court considered a law which gave financial stipends to returning World War I veterans to enable them to attend any nonprofit college,

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[18] *Reynolds v. Nusbaum*, 17 Wis.2d 148, 156, 115 N.W.2d 761, 765 (1962), interpreted the terms "religious seminaries," to include parochial elementary and secondary schools (citing *State ex rel. Weiss v. District Bd. of Sch. Dist. No. 8 of the City of Edgerton*, 76 Wis. 177, 215, 44 N.W. 967 (1890)). However, the interpretation that a sectarian school is equivalent to a "religious seminary" was retreated from in *Nusbaum I*, 55 Wis.2d at 335 n.33, 198 N.W.2d at 660 n.33.

[19] The majority opinion does not distinguish *Atwood*, yet its facts most closely resemble those presented by Parental Choice and it is still good law.

vocational school, high school or elementary school in the state, including religious schools. The use of the funds by the schools was not restricted. While not articulating a lengthy reasoning process in reaching the conclusion that the act did not violate the benefit clause, the Court clearly examined whether the payments received by the schools offset the additional costs to the schools which were generated by educating the veterans. It stated:

> The contention that financial benefit accrues to religious schools from the act is equally untenable. *Only actual increased cost to such schools occasioned by the attendance of beneficiaries is to be reimbursed.* They are not enriched by the service they render. Mere reimbursement is not aid.

Id. at 263-64, 176 N.W. at 228 (emphasis added). As has been discussed above in First Amendment context, and as will be discussed below in Article I, § 18 challenges, the concern that a religious school not be compensated for expenses which it would have had notwithstanding the program at issue remains a part of religious freedom jurisprudence. This is so because payment of those expenses may be viewed as subsidizing religion, if the institution's use of the funds is unrestricted. *See Agostini*, 117 S.Ct. at 2011; *Nusbaum* I, 55 Wis.2d at 327, 198 N.W.2d at 655.

In *State ex rel. Reynolds v. Nusbaum*, 17 Wis.2d 148, 115 N.W.2d 761 (1962), the Court addressed a facial challenge to a statute which provided transportation to and from public schools for all pupils residing in a school district two or more miles from the nearest public school, regardless of whether they attended public or private schools. In coming to its conclusion that an unconstitutional benefit would be provided to parochial schools under the act,[20] the Court employed an analysis which pre-

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[20] The holding in *Reynolds v. Nusbaum* was overturned by the amendment of Article I to add § 23, which provides:

dates the use of the *Lemon* test [21] under federal or state jurisprudence, but which applied criteria very similar to the first two prongs of *Lemon*.

First, the Court in *Reynolds* directed that when confronted with a challenge under the benefit clause, "the *crucial question* is whether the benefits which the parochial schools would receive under the act are *of a category* to constitute a violation of sec. 18, art. I, Wisconsin constitution." *Id.* at 157, 115 N.W.2d at 766 (emphasis added). Second, it examined "category" in two ways: in terms of the specific benefit provided and in terms of the class to which the benefit was directed. The Court listed examples of benefits, such as police and fire protection, that did not run afoul of the benefit clause and concluded they were benefits that were neutral [22] in regard to religion. "[A]ll of these public services and facilities are provided to the public, . . . generally on a basis whereby no classification is made as to religious organizations or schools. It is this which distinguishes these benefits from those sought to be conferred by the instant act." *Id.* It also considered benefits given directly to religious organizations which did not apply to the public generally, such as the tax exemption given to religious or parochial school property under § 70.11(4), STATS. The Court concluded tax benefits were in a category that was neutral [23] because the class to which it applied included all nonprofit organi-

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Nothing in this constitution shall prohibit the legislature from providing for the safety and welfare of children by providing for the transportation of children to and from any parochial or private school or institution of learning.

21 *Lemon v. Kurtzman* was decided in 1971.

22 Although the Court did not use the term "neutral," it set up the requirement of religious neutrality, both for the specific benefit given and for the characteristics of the class of recipients, if an act was to pass constitutional muster on a benefit clause challenge.

23 See note 18 above.

zations, not simply those affiliated with a religious organization. *Id.* at 158-59, 115 N.W.2d at 766.

As part of its analysis of whether the act provided for a "category" of religiously neutral benefits, the Court found [24] that prior to the act, the parochial schools had paid part, or all, of the cost of transportation of their pupils; and therefore, it was the schools who stood to benefit financially because, by the operation of the new law, they were being relieved of costs they would have had anyway.[25] *Id.* at 156, 115 N.W.2d at 765. Therefore, the specific benefit was not neutral to religion because it subsidized the costs of the religious schools. The analysis used in *Reynolds* is very similar to the primary effect test of *Lemon*, which currently requires religious neutrality in the criteria which define the class of beneficiaries and religious neutrality in regard to the specific benefit provided. *Witters*, 474 U.S. at 490-91 (Powell, J., concurring).

However, of equal significance, when *Reynolds* is examined in light of current federal and state jurisprudence for establishment challenges, the Court concluded the act failed the equivalent of the first prong of the *Lemon* test: It didn't have a valid secular purpose. The Court explained:

> The attorney general argues that this act is sustainable on the basis that the transportation of parochial

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[24] This factual finding of the court is grounded in the stipulation of facts provided by the parties.

[25] It also concluded the religious schools were benefited by increased enrollment. *Reynolds*, 17 Wis.2d at 156, 115 N.W.2d at 765. Apparently this conclusion comes from the Court's assumption that in some parochial schools the parents were required to pay for some of the costs of busing and, if relieved of that expense, more parents would be likely to choose a religious education for their children than would otherwise do so. In so reasoning, it relied on *Judd v. Board of Educ.*, 278 N.W. 200, 212, 15 N.E.2d 576, 582 (1938), which has been overruled. *Board of Educ. v. Allen*, 281 N.Y.S.2d 799, 803, 228 N.E.2d 791, 793 (1967).

> school pupils would promote their health and welfare. It could also be argued with equal plausibility that a direct grant in aid of public funds to parochial schools promotes the general welfare of pupils of such schools because it aids in their education.

Reynolds, 17 Wis.2d at 160, 115 N.W.2d at 767. And lest there be any doubt that the Court in *Reynolds* did not find a valid secular purpose for passing the act, in *Warren v. Reuter*, the Court reiterated that determination:

> In *State ex rel. Reynolds v. Nusbaum* (1962), 17 Wis.2d 148, 115 N.W.2d 761, this court did not accept the declaration of the legislature but determined the purpose of the school bus law in its "realistic operation" was to benefit the private schools rather than promote the safety of children.

State ex rel. Warren v. Reuter, 44 Wis.2d 201, 212, 170 N.W.2d 790, 794 (1969).

In *Nusbaum II*, the Court upheld the constitutionality of a comprehensive act whose purpose was to provide handicapped children with special services to meet their educational needs, even when that purpose was accomplished by school boards contracting directly with religious organizations and paying them to provide educational programs for the children. In analyzing the constitutional challenges, the Court stated, "Initially it must be recognized that the mere contracting for goods or services for a public purpose with a sectarian institution is appropriate state action." *Nusbaum II*, 64 Wis.2d at 324, 219 N.W.2d at 583. This reasoning is consistent with the conclusion set forth in *Atwood*, that if the act simply allows payment for the services a religious organization provides, the money drawn from the treasury is not for the benefit of a religious organization. It is also consistent with the converse proposition stated in *Reynolds*, that if payment supplants costs a religious school would have had notwith-

standing the act, it does have the primary effect of benefiting religion.

King provides the most recent Wisconsin Supreme Court consideration of a benefit clause challenge. There, King claimed a crèche the Village of Waunakee placed in a village park during the Christmas holiday season was unconstitutional. It was contended that village monies were used to erect and maintain the crèche, thereby bestowing a benefit on those of the Christian faith contrary to Article I § 18. The Appellants urged the Court to conclude that *Reynolds* required a constitutional analysis for Article I, § 18 that is different from that used in Establishment Clause cases.[26] But the Court rejected that contention, and it held that, at least for a benefit clause challenge,[27] it would interpret and apply Article I, § 18 in accord with the United States Supreme Court's interpretation of the Establishment Clause. *King*, 185 Wis.2d at 54, 517 N.W.2d at 683.

Therefore, this dissent follows the directive of *King* in analyzing this facial challenge to Parental Choice. As explained above, Parental Choice passes the *Lemon* test, as that test has been explained by the United States Supreme Court. However, that conclusion does not end my analysis, contrary to what is stated in the majority opinion. Wisconsin Supreme Court decisions support my conclusion that Parental Choice does not violate the Wisconsin Constitution.

The majority agrees that the act has a valid secular purpose; but, it defines "benefit" as the money the State

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[26] In the First Amendment section of its analysis, the Court applied the *Lemon* test.

[27] As noted earlier, the Wisconsin Supreme Court departs from the analytical framework used in federal Establishment Clause challenges, when it reviews a free exercise challenge under Article I, § 18.

provides and concludes that religious schools would be "benefited" because they would be paid for the services they provide to lower-income children under the act. There are two errors in that analysis: First, by focusing on the money the State is providing, rather than on the nature of the benefit received by the children, the majority assumes that a recipient of state funds cannot choose to use state funds to purchase services from a religious institution without offending the constitution. This is an incorrect assumption under both Wisconsin and the United States constitutional jurisprudence. *Atwood*, 170 Wis. at 263-64, 176 N.W. at 228 (concluding that veterans may use state-provided dollars to attend religious schools); *Nusbaum II*, 64 Wis.2d at 324, 219 N.W.2d at 583 (concluding that it is constitutionally permissible to use state funds to purchase goods or services from a sectarian institution); *Rosenberger*, 115 S.Ct. at 2523 (concluding that the expenditure of governmental funds is not prohibited simply because those funds pay for a service that is sectarian in some respects); *Zobrest*, 509 U.S. at 8 (concluding that religious institutions are not disabled by the First Amendment from participating in publicly sponsored social welfare programs); and *Witters*, 474 U.S. at 488 (concluding that it is constitutionally permissible for a private citizen to choose to purchase a religious education with government funds).

Second, the majority assumes that when a religious school is paid, it has received public funds for the benefit of a religious seminary. This latter assumption appears to be bottomed in part on the concern that there are no restrictions on how the schools can use the monies they receive and in part on the majority's conclusion that sectarian secondary and elementary schools are "religious seminaries." However, if each school is paid no more than the cost to it of providing educational programming for

Parental Choice students whom it serves,[28] no school will receive a constitutionally impermissible benefit. *Atwood*,[29] 170 Wis. at 263-64, 176 N.W. at 228 (concluding that payment for rendering a service is not a financial benefit to a religious school); *Witters*, 474 U.S. at 488 (concluding there is no constitutional impediment to a Christian college's receipt of monies provided by the government under a social welfare program). And, *Nusbaum II* clearly states, "[T]he court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Nusbaum II*, 64 Wis.2d at 324, 219 N.W.2d at 583. Furthermore, as indicated in note 18 of this dissent, just because a school has sectarian ties, one cannot presume it is a "religious seminary." *Nusbaum I*, 55 Wis.2d at 335 n.33, 198 N.W.2d at 660 n.3.

Another factor on which the majority opinion rests is the determination that the religious mission of the participating schools so infuses every aspect of instruction that state sponsored religious indoctrination is certain to occur. It concludes that, "the sectarian aspects of their educational program are intertwined with the secular subjects;" and therefore, there will be a "purposeful infusion" of religion into all aspects of the education provided. This is a factual determination in regard to how religious affiliated schools will teach secular subjects. In support of this assertion, the majority repeats some mission state-

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[28] It really does not matter whether a school receives more or less than it currently charges students for tuition, so long as the amount paid does not exceed the *school's cost* of providing educational programming for Parental Choice students under its care.

[29] At oral argument, Respondents' counsel argued that *Atwood* was "obscure;" and therefore, of no value in analyzing the case at hand. I disagree. *Atwood* is a decision of the Wisconsin Supreme Court, bottomed on State payments that citizens could choose to use to attend religious schools. Therefore, an appellate court may not ignore it.

ments from the exhibits which were attached to the stipulated facts. However, the same documentation provides the following information which would support an opposite factual determination:

Catholic East Elementary School: "Children of all religions and races are admitted."

All Saints Catholic Elementary School: "All Saints Catholic Elementary School is proud of the broad, multicultural background of its students. Applicants are accepted without regard to race, creed, or ethnic heritage." (Only one religious person is listed on its staff roster).

Blessed Trinity School: The staff is made up of thirteen married women, two women listed after a "Ms." designation, and three men, who are not priests or religious brothers. There is no information provided about their religious beliefs or lack thereof.

"The curriculum incorporates competency based levels of instruction in the reading and math programs and appropriate grade-level instruction in language arts, science, social studies, physical education and the fine arts. The foundation of our education approach stresses the uniqueness of the individual and generates an appreciation for each child's needs and contributions."

Marquette University High School: "Each year 99% of graduates attend four-year colleges and universities. . . . In 1993, Marquette High School recorded 19 National Merit Semi-Finalists."

Devine Savior Holy Angels High School: "DSHA offers a comprehensive and challenging academic program; approximately 95 percent of our graduates attend college. . . . DSHA offers two new state-of-the-art computer labs with 62 fully-configured workstations available to students throughout the day."

Given that information, and much more contained within the exhibits attached to the stipulation of facts, it would be reasonable to infer that the children who would attend these sectarian schools and the professional educators who teach in them would focus on mathematics when they are in math class, on chemistry when they are in chemistry class, and on penmanship when that is the topic of the moment. If they had not done so in the past, the students would not have achieved the academic success shown by the exhibits.

Furthermore, the record before this court does not indicate the religious preference of the teachers of secular subjects in the private schools. Nor was any information provided about the type of textbooks used to teach secular subjects. Drs. Fuller and White's report does show that for the public high schools listed in Table 18, the religious affiliation of the students who attended those schools in 1993-94, differed from that of the institution by as much as sixty percent and the exhibits reflect that children of all creeds are welcomed.

Given the conflicting factual inferences revealed by the record, I am mindful that this appeal occurs after a motion for summary judgment. On this record, a court cannot conclude, as a matter of law, that all subjects that will be taught at sectarian schools will be infused with a religious message. *Vocational, Technical and Adult Education, Dist. 13 v. DILHR*, 76 Wis.2d 230, 240, 251 N.W.2d 41, 46 (1977) (concluding that there must be only one reasonable inference that can be drawn from the facts presented before a factual determination may be made as a matter of law). Furthermore, a presumption that religion would be injected in secular subjects was present in *Ball*, which *Agostini* overturned, instructing that such a presumption may not be valid in each educational institution. *Agostini*, 117 S.Ct. at 2010. The Wisconsin Supreme Court has also concluded that "pervasively sectarian" is a factual determination. "The determination

whether an institution is pervasively religious is to be made with regard to the entire context in which the institution operates." *State ex rel. Wisconsin Health Facilities Authority v. Lindner*, 91 Wis.2d 145, 158, 280 N.W.2d 773, 780 (1979). Therefore, the conclusion that a statute sponsors religious indoctrination now requires a factual record to support it. However, no conclusive factual record exists here.

And in addition, § 119.23(7)(c), STATS., requires the private schools to abide by the choice of each student's parents in regard to whether the student will participate in *any religious activity*. The statute does not limit "religious activity" to that which occurs in religion class. Parents have the choice to opt-out of *all* religious activities. Therefore, I am unwilling to presume, unsupported by a conclusive factual record, that the participating sectarian schools will attempt to violate the clear mandate of the law regarding religious activities, simply because some have a religiously focused mission statement. And, given the holding in *Agostini*, a court should not presume that state sponsored religious indoctrination or a symbolic union between the church and state occurs by virtue of the payments made to parents under the program because it is the parents who choose religion, not the State. *Agostini*, 117 S.Ct. at 2010. That is not to say that there may not be certain participating schools that are so infused with religious messages that even attendance at a mathematics class would constitute religious instruction, but this record is insufficient to determine how the instructions in secular classes are conducted. Furthermore, individual challenges to the constitutionality of the statute are not before this court. *See Tilton v. Richardson*, 403 U.S. 672, 682 (1971) (holding that in deciding on a facial constitutional challenge, it is improper to consider only limited hypothetical applications).

The majority concludes that the benefit clause challenge is controlled by *Reynolds* and *State ex rel. Weiss v. District*

Bd. of Sch. Dist. No. 8 of the City of Edgerton, 76 Wis. 177, 44 N.W. 967 (1890). While I agree that each case provides guidance on the development of benefits clause jurisprudence, neither case is dispositive of this appeal and the majority's reliance on them is misplaced.

First, Parental Choice differs from the busing at issue in *Reynolds* because all parties agree that there was a valid secular purpose underlying the passage of Parental Choice. While in *Reynolds*, the Court specifically concluded that the act was an attempt to benefit private schools rather than to promote the safety of school children.[30] Furthermore, the payments made under Parental Choice program will pay only for the educational programming services Parental Choice students receive. They will not supplant costs that the schools would have had were it not for Parental Choice.[31] Second, later cases have retreated from the broad edicts of *Weiss* when analyzing benefit clause challenges. For example, *Nusbaum I* addresses a change in the definition of "religious seminary" stated in *Weiss*:

> On the corollary point of whether the university here is to be considered as one of the "religious or theological seminaries" in this state, we agree that the university, in all of its operations, cannot be considered as a completely secular institution. However, *Tilton* [32] lessens the reach of earlier decisions of this court [33] insofar as the first amendment is concerned, *and we accept that decision as entirely persuasive, even if not controlling, in establishing a difference*

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30 *See* discussion at p. 25, above.

31 *See* discussion at pp. 15-16, above.

32 *Tilton v. Richardson*, 403 U.S. 672 (1971).

33 *Weiss*, 76 Wis. at 215, and *Reynolds*, 17 Wis.2d at 156, were specifically limited by *Nusbaum I* in regard to their conclusions that religious schools are "religious seminaries" as referenced in Article I, § 18. *Nusbaum I*, 55 Wis.2d at 335 n.33, 198 N.W.2d at 660 n.33.

> *based on function* between various aspects of the university operation.

Nusbaum I, 55 Wis.2d at 334, 198 N.W.2d at 659 (emphasis added). Therefore, I conclude the Respondents have not met their burden to prove, beyond a reasonable doubt, that Parental Choice violates the benefit clause.

b. Compelled Support Clause.

The compelled support clause of Article I, § 18 states, "[N]or shall any person be compelled to attend, erect or support any place of worship." The majority opinion also concludes that Parental Choice violates this clause, mainly due to *Weiss*.

"Compelled support" may be examined in terms of participation or in terms of money. In *Weiss*, it was based on both: participation in a religious activity (Bible reading) that was contrary to the beliefs of some of the students and taxpayers' financial support of the school where the Bible reading occurred. In order to examine the challenge within the words of the constitution, the Court first decided that Bible reading was "worship." *Weiss*, 76 Wis. at 213, 44 N.W. at 980. And, because that participation occurred in school, the Court concluded that the school became a "place of worship," at least for the time when the Bible reading was occurring. *Id.* In concluding that Bible reading violated the compelled support clause, it determined that because taxpayers were compelled to pay for the school through their taxes, they were being compelled to support a place of worship in violation of the religious freedoms guaranteed in Article I, § 18. *Weiss* leaves open the question of whether a school which has religious teaching during a part of its schedule is a place of worship when secular subjects are being taught.

In *Holt v. Thompson*, 66 Wis.2d 659, 225 N.W.2d 678 (1975), the Court examined a statute which provided for released time from public school instruction so that stu-

dents could attend religious education classes. Attendance reports were required from the religious organizations on a monthly basis, as the classes were not conducted in the public schools. In this regard, the challenge focuses on compelled support, in the sense of participation. In holding the act constitutional, the Court noted that: 1) participation in religious education was only "permitted," as attendance was volunatry; 2) the parents chose whether a child would attend religious instruction, not the State; and 3) even though the State did require attendance reports, those reports were not to compel attendance at religion classes, but rather to prevent deception by students who were "heading to the local pool hall." *Id.* at 676-77, 225 N.W.2d at 683. The Court also pointed out that while there might be some application of the statute which would operate to compel a student to attend or support a place of worship, such a challenge could not be made facially to the statute as enacted. *Id.* at 677, 225 N.W.2d at 683.

Parental Choice complies with the principles of *Holt*. It does not require any parent to send his/her child to a religious school. That choice is left to the parents. It does not require participation in any religious activity. That choice is left to the parents. The participating schools are required, notwithstanding any religious affiliation which they may have, to admit students on a random basis, with the limited exception of giving preference to siblings already in attendance. Furthermore, if parents choose to send their children to religious education classes, that is a choice that was approved by the Court in *Holt*, so long as the instruction did not take place in a public school.

Parental Choice also does not run afoul of the holdings of *Weiss* and the later cases which examine the definitions of constitutional terms found in *Weiss*. Parental Choice provides an opportunity for alternate education for children from lower-income families. The only way in which the State can do that is to give the parents money that is

tied to educational opportunity. When that occurs, it does not follow that taxpayers are compelled to support a place of worship. Rather, taxpayers are supporting a social welfare program designed to increase academic achievement for those who need it most. Additionally, if one focuses on the money paid by the State to citizens for social programs rather than on the benefit the citizens receive, one could conclude that many state-funded programs are constitutionally infirm, *e.g.*, state payments for medical care delivered in a religious hospital, state payments for child-care provided in a sectarian nursery and many post secondary educational programs.[34]

Furthermore, the record presented in this summary judgment proceeding is insufficient for this court to conclude, as a matter of law, that the sectarian schools that are eligible to participate are so "pervasively sectarian" that it isn't possible for a parent to choose that his or her child not receive religious instruction. For example, the stipulation of facts provides there were "approximately 89" sectarian schools eligible to participate in Parental Choice during the 1995-96 school year, but the record contains materials from only 51 sectarian schools. No information is provided about the remaining 38 religious schools. There is no information provided about how secular subjects are taught or about the religious persuasion of the teachers who teach them. The factual record presented is just as capable of supporting the conclusion that many of

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[34] Section 39.435(5), STATS., provides educational talent incentive grants which may be used in sectarian institutions. Section 39.44(2), STATS., provides minority undergraduate grants which may be used in religious schools. Section 39.45, STATS., provides grants for higher education, based on need, that can be spent at any public or private nonprofit educational institution. And, § 39.46, STATS., provides for payments to Marquette Dental School, structured to meet the concerns of the Court in *Nusbaum I* where *the only choice* was a religiously affiliated school and the Court required certain assurances that secular and sectarian teachings would not be intermixed.

the sectarian schools teach religion only in religion class, much as mass is said in a Catholic hospital each day, but the hospital also provides quality patient care that is not tied to any religious message, as it is the majority's conclusion that there is a "purposeful infusion of religion" in all subjects.

A complete factual record is critical to this court because *Nusbaum* I directs that we must examine the specific function at issue and the reason for the function before we can conclude whether it is sectarian or nonsectarian. For example, the function of mathematics classes in the sectarian schools and the manner in which they are being taught are questions which must necessarily enter into our consideration of whether an institution is so sectarian that even attendance at mathematics class entails religious indoctrination. *Nusbaum I*, 55 Wis.2d at 335, 198 N.W.2d at 660. Additionally, *Nusbaum I* limits some of the sweeping language in *Weiss* and *Reynolds*, thereby giving further support to Appellants' argument that because parents can choose whether to send their children to a sectarian school in the first instance and can choose to exempt their children from all religious activities, Parental Choice does not result in compelled support of a place of worship.

One must not lose sight of the reason underlying the compelled support clause of Article I, § 18. It is to prevent *the State* from making pro-religion choices for its citizens. It is not to prevent parents from making pro-religion choices for their children. The State must remain neutral in regard to religion, neither preferring nor evincing hostility towards it. Parental Choice maintains that neutrality. To paraphrase Justice O'Connor in *Witters*, no reasonable observer is likely to conclude that by enacting Parental Choice, the State of Wisconsin is endorsing, promoting, compelling or preferring a religious practice or belief. Therefore, on the record before the court, I

conclude Parental Choice has not been proven to violate the compelled support clause.

The majority summarizes its conclusion of a constitutional violation in the statement that the "missions and methods of many of the sectarian schools eligible to participate in the amended program, show that some of them are at least as worthy of being deemed 'places of worship' as was the Edgerton Public School in 1890." As set forth more completely above in this dissent, that statement incorporates a factual finding about how secular subjects would be taught in the sectarian schools that the record does not support. The majority also focuses on money, not on the social program at issue. Social welfare program at issue. Social welfare programs generally involve state funds. Therefore, it is my determination, that on this record, the Respondents have not met their burden of proving Parental Choice violates the compelled support clause, beyond a reasonable doubt in all possible applications.

2. Article X, § 3.

The Respondents also challenge Parental Choice under Article X, § 3 of the Wisconsin Constitution, which states:

> The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours.

Necessary to this challenge is their assertion that any school which receives payments from parents under this program is a "district school" within the meaning of Article X, § 3. The Wisconsin Supreme Court recently ad-

dressed this contention in *Davis v. Grover*, 166 Wis.2d 501, 480 N.W.2d 460 (1992). There, it was conclusively decided that only public schools are "district schools" and that payments directly to the schools which participated in the initial school choice plan did not transform those schools into public schools. *Id.* at 540, 480 N.W.2d at 474. While it is appreciated that there are some differences in the two school choice programs, they are not sufficient to distinguish *Davis*.

3. Article IV, § 18.

The Respondents further challenge Parental Choice as a local bill, under Article IV, § 18 of the Wisconsin Constitution, which states, "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." This provision was designed to: 1) encourage the legislature to devote its time to laws which affect the entire state; 2) be certain the public had the opportunity to know of the subject matter of legislation under consideration; and 3) avoid the appearance of legislative favoritism and discrimination that can occur with laws of limited applicability. *Milwaukee Brewers Baseball Club v. H.S.S.*, 130 Wis.2d 79, 107-08, 387 N.W.2d 254, 266 (1986). Challenges based on an assertion that an act began as a local bill are first examined to determine whether the process by which the bill was passed deserves a presumption of constitutionality and then to determine whether the challenged acts was a private or local bill within the meaning of Article IV. *Davis*, 166 Wis.2d at 520, 480 N.W.2d at 466. There is a distinction between examining the constitutionality of the process which created the legislation and the substance of the law as enacted. *City of Brookfield v. Milwaukee Metropolitan Sewerage Dist.*, 144 Wis.2d 896, 912-13, 426 N.W. 591, 599 (1988).

The process by which Parental Choice was enacted was proper. The bill was not smuggled or log-rolled through

the legislature. It was thoroughly debated on the floor of the Assembly and the Senate and extensive public hearings were held in many locations, such as Milwaukee, Cedarberg, Madison, Portage and River Falls. Interests both for and against Parental Choice had ample opportunity to bring their concerns to the attention of the legislature. Therefore, I conclude that Parental Choice is presumptively constitutional and the Respondents bear the heavy burden of proving a constitutional violation beyond a reasonable doubt.

When examining whether Parental Choice began as a local bill, *Davis* directs consideration be given to: 1) whether it refers to particular people, places or things; 2) whether it involves a prohibited category under Article IV, § 31; or 3) whether it creates a closed classification. *Davis,* 166 Wis.2d at 524-25, 480 N.W.2d at 467-68. The third concern, that of a closed class, is the focus here because only Milwaukee students are eligible at present.

The same challenge was made and decided in favor of constitutionality in *Davis.* The Respondents urge this court to reconsider the issue, notwithstanding *Davis,* because there have been changes in the statute that undermine that holding. I do not agree. The factors which controlled the Court's decision there remain, and if an appellate court is to modify the conclusions reached in *Davis* based on the changes in the current school choice program, that must be done by the Wisconsin Supreme Court. Therefore, I conclude that based on controlling precedent, Parental Choice was not a local bill.

Public Purpose

The Respondents contend that Parental Choice was enacted without a valid public purpose. The public purpose doctrine requires that "public expenditures may be made only for public purposes." *Davis,* 166 Wis.2d at 540, 480 N.W.2d at 474. "[W]hat constitutes a public purpose is in the first instance a question for the legislature

to determine and its opinion should be given great weight." *Warren*, 44 Wis.2d at 212, 170 N.W.2d at 795. And, when public funds are appropriated for use at a private institution, the program must be subject to controls and accountability requirements sufficient to guard the public interests which justify the expenditure. *Id.* at 215-16, 170 N.W.2d at 796. "Only such control and accountability as is reasonably necessary under the circumstances to attain the public purpose is required." *Id.* at 216, 170 N.W.2d at 796.

There is no dispute that improving the academic achievement of lower-income students is a valid public purpose. Rather, the dispute centers on whether the controls are reasonable under the circumstances. I look to *Davis* for guidance in this regard. There, the Court examined controls that require: 1) the private schools to provide their students with an education that complies with § 118.165, STATS.; 2) the quality of the education in regard to student progress be subject to measurable standards; 3) parents to choose for their own children that which is most likely to promote academic achievement; and 4) the cost of the program be restricted. *Davis*, 166 Wis.2d at 542-46, 480 N.W.2d at 475-77. The controls instituted by the legislature for Parental Choice measure up to those found sufficient in *Davis*. First, the schools must comply with all the requirements of § 118.165, STATS. Second, § 119.23(7), STATS., sets forth measurable quality standards. Third, the parents of the children are still making the choice of school for their own children, and fourth, the cost of the program is limited by the scope of its application and by the cost of providing educational programming for the Parental Choice students or the per-pupil amount allocated to Milwaukee Public School, whichever is less. Therefore, I conclude that Parental Choice does not violate the public purpose doctrine.

Equal Protection.

The NAACP Respondents request this court to conclude that its claim that Parental Choice violates the equal protection provisions of the United States and Wisconsin constitutions remains viable and can be proceeded upon, if this court should reverse the circuit court and conclude Parental Choice is constitutional. Because the claims the NAACP made were stayed by the circuit court and because the majority opinion concludes that Parental Choice is unconstitutional, thereby giving the NAACP the relief it seeks, there is no reason to consider the matter further at this time.

CONCLUSION

Parental Choice is a social welfare program which provides educational opportunities (a religion-neutral benefit) to children from lower-income families (a religion-neutral class). Because the money paid to the parents is equal to, and must be spent for, the costs to the participating schools of providing educational programming, the payments do not provide an incentive for parents to send their children to religious schools, rather than keeping them in Milwaukee Public Schools. Additionally, the schools receive no payments "for the benefit of" religious seminaries. The schools receive payments for the educational programming they provide to students who participate in the program.

Although parents can choose to permit their children to exercise this educational opportuntiy in sectarian schools, they can also choose that their children not participate in any religious activities. If certain schools were not to honor that choice, as the majority suggests may occur because of some mission statements, it does not follow that Parental Choice is unconstitutional. Rather, what follows is a recognition that those schools would not be in compliance with the act.

Furthermore, for those students whose parents choose to permit them to attend religion class, a similar choice

was approved by the Wisconsin Supreme Court in *Holt*. That parents are able to make a choice which has a religious component only because of the state payments they receive, is not unique to Parental Choice. Other examples are: 1) the choice a citizen makes when he is treated in a relgiously affiliated hospital, prays with the chaplain each day, and the State pays the hospital's bill; 2) the choice a parent makes to have his/her child cared for in a daycare which is operated by a religious organization, and the State pays the daycare bill; 3) the choice students make to attend sectarian colleges, and the State provides the money to permit that choice pursuant to §§ 39.435 and 39.44, STATS. Neither the federal nor the state constitution is contravened by any of these choices because the State is not advancing religion through the social welfare benefit it provides. It is the individual citizen who chooses to use a state social welfare benefit in a setting that has a religious connection. As Justice Douglas wrote, and as was quoted with approval in *King*:

> When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

King, 185 Wis.2d at 46, 517 N.W.2d at 680 (citing *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952)).

Because I conclude that Parental Choice neither promotes religion nor is hostile to it, but instead leaves religious choices with the parents where they are constitutionally permissible, I must respectfully dissent.

APPENDIX C

CIRCUIT COURT
BRANCH 17
DANE COUNTY
STATE OF WISCONSIN

Case No. 95 CV 1982

WARNER JACKSON, *et al.*,
Plaintiff,

VS.

JOHN T. BENSON, *et al.*,
Defendant.

Case No. 95 CV 1997

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, *et al.*,
Plaintiff,

VS.

JOHN T. BENSON, *et al.*,
Defendant.

Case No. 96 CV 1889

NAACP, *et al.*,
Plaintiff,

VS.

JOHN T. BENSON, *et al.*,
Defendant.

MEMORANDUM DECISION AND ORDER

This case is before the court on a summons and complaint filed by the various plaintiffs contending that defendant, the Sate of Wisconsin, violated the Establishment Clause of the First Amendment of the United States Constitution, Article I, sec. 18 of the Wisconsin Constitution, Article IV, sec. 18 (the "public or local bill" law) of the Wisconsin Constitution, Article X, sec. 3 (the "uniformity clause" law) of the Wisconsin Constitution, and the public purpose doctrine, by creating 1995 Wis. Act 27, secs. 4000-4010, amending sec. 119.23, Stats. (the Milwaukee Parental Choice Program). Plaintiffs seek declaratory and injunctive relief. Defendants contend the Milwaukee Parental Choice Program, as amended, is constitutional under the federal and Wisconsin constitutions.

All parties have filed motions for summary judgment, stipulating that no material fact is in dispute and that they are entitled to judgment as a matter of law. This case is ripe for summary consideration from this court.[1]

Federal and state constitutional provisions are implicated in this case. It is prudent, however, for this court to rely on the state provisions if possible without answering the federal questions. This court does so and does not address any of the federal questions posed by this case. Furthermore, plaintiffs NAACP, et al. raise Article X, sec. 1 objections to the program, which will not be addressed. Finally, defendants/internors Marquelle Miller, et al. claim in defense that should this court strike down

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[1] Plaintiffs NAACP filed their complaint in August, 1996, two days before oral arguments were heard on defendants' motion to lift the preliminary injunction imposed by the Wisconsin Supreme Court. After written arguments, this court consolidated the NAACP complaint with this action but stayed their equal protection claim. The balance of the NAACP's complaint was allowed to proceed since their claims were essentially the same as the other plaintiffs'.

the program, sec. 119.23, et seq., as amended, will violate the federal First Amendment and the freedom of religion or conscience provision of Article I, sec. 18. No specific reference is made to this defense since it is not properly before the court as a claim. And, as you will see, the entire program is found to be unconstitutional.

This court has reviewed all briefs with attachments, given serious consideration to all oral arguments presented, and has examined the law scrupulously. With all of this in mind and for the following reasons this court holds that the amended MPCP violates Article I, sec. 18, Article IV, sec. 18 of the Wisconsin Constitution, and the public purpose doctrine as it is applied to sectarian schools. The amended MPCP does not violate Article X, sec. 3 of the Wisconsin Constitution and the public purpose doctrine as it is applied to nonsectarian schools. Therefore, the entire MPCP as amended is unconstitutional and is ordered to be terminated. However, based on stipulation by all parties, this order is stayed until the close of the 1996-97 school year for all private schools participating in the amended MPCP.

Let us be clear about what is not at issue in this case. Much has been made about whether "school choice" is sound public policy. That concern is best left to the legislature. The scope of this court's role is strictly confined to considerations of possible constitutional infringement. Ours is to interpret and apply the law to facts as they are presented. Ours is not to second-guess the legislature and wear the mantel of policy makers. "School choice" may in fact be sound public policy, especially considering the sad plight of the Milwaukee Public School system. I refuse the urgings to consider policy arguments and, instead, place my sights on the legality of the MPCP, as amended.

STANDARD OF REVIEW

Defendants contend this challenge to the constiutionality of the amended MPCP is a facial challenge since the plaintiffs brought this suit before the program was implemented. If that is the case, "(p)laintiffs must . . . 'establish that no set of circumstances exists under which the [statute] would be valid.'" *See United States v. Salerno*, 481 U.S. 739, 745 (1987).

However, this court does not agree with the defendant's contention that a discussion of the specific application of the amended MPCP statute would merely be a matter of conjecture and speculation rather than established fact. The record is replete with facts. The amended MPCP was implemented after the plaintiffs brought this case. This has given the court ample opportunity to assess the actual operations of the program. Furthermore, both sides have agreed to a stipulated set of facts regarding the program. Thus, this court must judge the constitutionality of the program based on the application of the amended MPCP statute, and the motions for summary judgment will be decided accordingly.

BACKGROUND

Plaintiff ACLU and defendant State of Wisconsin eloquently lay out the background facts in their submissions to this court. Rather than attempt to restate what they so well have already stated, I incorporate relevant portions into this opinion with minor modifications.

A. Milwaukee Schools: An Educational Crisis

It is beyond dispute that the Milwaukee Public Schools (MPS) face the most serious educational challenges in the State. Indeed, the Supreme Court of Wisconsin recognized just a few years ago that "the Milwaukee Public School District has significantly greater education and poverty problems than any other school district in the state." *Davis v. Grover*, 166 Wis. 2d 501, 490 N.W.2d

460, 469 (1992). Moreover, "[t]he statistical data clearly illustrated that the socioeconomic disparities and the educational problems are greater in the large urban area of Milwaukee than any other part of Wisconsin." *Id.* at 529-30; *see also Kukor v. Grover*, 148 Wis. 2d 469, 482-83, 436 N.W.2d 568, 573-74 (1989).

By any measure of educational performance, Milwaukee Public Schools have performed dismally. For example, in 1989, when the original Choice Plan was under consideration, the dropout rate for high-school students reached 14.4 percent. *Davis* at 529. At the same time, the schools in the rest of the state enjoyed the relatively low dropout rate of 3.11 percent. *See id.* at 529. In light of the dropout rates in the MPS, it is not surprising that in 1989 less than 45 percent of MPS students graduated from high school within six years—down from 57 percent just five years earlier. *Id.* at 531. And of those who did graduate within six years in 1989, more than one third did so with a "D" average. *Id.*

The Wisconsin Supreme Court in *Davis v. Grover* found that these realities "dramatically show the need for legislative attention." *Id* .at 529. That legislative attention began with the original Milwaukee Parental Choice Program (the "MPCP" or "Choice Program") enacted in 1989, and continued with the amended MPCP now under challenge. 1995 Wisconsin Act 27, §§ 4002-09 (the "amended MPCP").

B. The Original Choice Program

In the spring of 1990, the Wisconsin Legislature created the Milwaukee Parental Choice Program, which is codified at sec. 119.23, Stats. The Original MPCP provided that "any pupil in grades kindergarten to 12 who resides within the city [of Milwaukee] may attend, at no charge, any nonsectarian private school located in the city," as long as certain requirements were met. *See* Sec. 119.23(2)(a), Stats. (1993-94).

From 1990 to 1994, the MPCP was open to 1% of the membership of the Milwaukee Public School district. For the 1994-95 school year, that percentage was raised to 1.5%—approximately 1,460 students. *See* Sec. 119.23 (2)(b)1., Stats. (1993-94); Agreed Upon Statement of Facts, ¶ 8. To take part in the program, a student's family income cannot exceed 1.75 times the federal poverty level. *See* Sec. 119.23(2)(a)1., Stats. As originally enacted, no more than 49% of a private school's total enrollment could consist of pupils attending under the MPCP. *See* Sec. 119.23(2)(b)2., Stats. (1989-90). That percentage was increased to 65 percent by 1993 Wis. Act 16, sec. 2300.

Under the Original MPCP, the Superintendent of Public Instruction paid participating private schools an amount equal to the per-pupil student aid provided to the Milwaukee public schools. *See* Sec. 119.23(4), Stats. (1993-94). The moneys disbursed under the MPCP are appropriated from general purpose revenues, *see* secs. 20.005(3)(fu) and 119.23(4), Stats., which consist primarily of general taxes collected by the state. *See* sec. 20.001, Stats.

C. The Amended Choice Program

The 1995-96 Budget Act, 1995 Wis. Act 27, which Governor Thompson signed into law July 26, 1995, expanded the MPCP. Most significantly, the Act eliminated the prohibition on participation by religious schools in the MPCP:

> SECTION 4002. 119.23(2)(a)(intro.), 2. and 3. of the statutes are amended to read:
>
> 119.23(2)(intro.) Subject to par. (b), beginning in the 1990-91 school year, any pupil in grades kindergarten to 12 who resides within the city may attend, at no charge, any **[nonsectarian]*** private school located in the city if all of the following

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[*] Bold bracketed material was struck through on original.

apply: . . . [Bracketed material struck through on original.]

1995 Wis. Act 27, sec. 4002, amending sec. 119.23 (2)(a), Stats.

The Budget Act also enlarged the number of students who can participate in the MPCP. As many as 7% of the Milwaukee school district's pupil population would have been able to participate in the Program during the 1995-96 school year, and up to 15 percent of the student population are eligible beginning in 1996-97. *See id.*, sec. 4003, repealing and recreating sec. 119.23(2)(b), Stats. Based on the 1995-96 Milwaukee School District estimated pupil population of 98,370 students (*see* Agreed Upon Statement of Facts, ¶ 12) nearly 7,000 students could have participated in the expanded MPCP in the 1995-96 school year, with up to 15,000 students potentially taking part in later years. The Act also repealed the restriction in the Original MPCP limiting a private school's enrollment to 65 percent MPCP students. *See* 1995 Wis. Act 27, sec. 4003.

The Budget Act amended the method by which the Superintendent pays tuition to private schools participating in the MPCP. Rather than making the check payable to the school as under the Original MPCP, the Superintendent will now make checks payable to the pupil's parent or guardian. The checks are sent not to the parents, however, but directly to the private school. The parents then must "restrictively endorse the check for the use of the private school":

SECTION 4006m. 119.23(4) of the statutes is amended to read:

119.23(4) Upon receipt from the pupil's parent or guardian of proof of the pupil's enrollment in the private school, the state superintendent shall pay to the **[private school]*** *parent or guardian*, from the

[*] Bold bracketed material was struck through on original.

> appropriation under s. 20.255 (2) (fu), an amount equal to the total amount to which the school district is entitled under s. 121.08 divided by the school district membership, *or an amount equal to the private school's operating and debt service cost per pupil that is related to educational programming, as determined by the department, whichever is less.* The state superintendent shall pay 25% of the total amount in September, 25% in November, 25% in February and 25% in May. *The department shall send the check to the private school. The parent or guardian shall restrictively endorse the check for the use of the private school.* [Bracketed material struck through on original.]

1995 Wis. Act 27, sec. 4006m, amending sec. 119.23 (4), Stats.

There are no limitations on how private schools, including religious schools, may use the funds they receive under the MPCP. The funds may be used to support all of the educational functions of the school, including religious education, and they may be used to maintain, repair or construct facilities, including facilities used for religious purposes. *See* Agreed Upon Statement of Facts, ¶ 28. As under the Original MPCP, funds paid to schools under the Amended MPCP are drawn from general purpose revenues. *See* sec. 119.23(4), Stats., as amended by 1995 Wis. Act 27, sec. 4006m.

Private schools that participate in the Amended MPC will receive the lesser of the amount of per-pupil state aid to the Milwaukee public schools under sec. 121.08, Stats., or "an amount equal to the private school's operating and debt service cost per pupil that is related to educational programming, as determined by the department." *Id.* The per-pupil state aid provided to MPS under sec. 121.08 for the 1995-96 school year was approximately $3,667. *See* Agreed Upon Statement of Facts, ¶ 29. For the 1996-97

school year, the amount is approximately $4,400. *See* Deposition of Deputy State Superintendent of Public Instruction Steven B. Dold, p. 35, included in the Appendix to MTEA's Motion for Summary Judgment.

Under the Amended MPCP, participating schools must allow students to opt-out of "religious activities." The amended statute provides that:

> A private school may not require a pupil attending the private school under this section to participate in any religious activity if the pupil's parent or guardian submits to the pupil's teacher of the private school's principal a written request that the pupil be exempt from such activities.

Sec. 119.23(7)(c), Stats., created by 1995 Act 27, sec. 4008. Students attending a religious school under the MPCP who have not opted-out may participate, at state expense, in the full-range of religious activities offered by the school.

Furthermore, the amended MPCP eliminated some of the reporting requirements included in the original MPCP. Under sec. 119.23(5)(d), Stats., of the original MPCP, the State Superintendent of Public Instruction was required to prepare and circulate a report to the relevant legislative committees each year. This report compared students participating in the MPCP with students enrolled in Milwaukee public schools in the following areas: "academic achievement, daily attendance record, percentage of pupils suspended and expelled and parental involvement activities of pupils attending a private school." *Id.* The amended MPCP eliminated this requirement. The amended MPCP also eliminated sec. 119.23(9)(a), Stats., which authorized the superintendent to "conduct one or more financial or performance evaluations, audits, or both."

The amended MPCP did maintain some of the reporting requirements, however. The participating schools are still

required to follow uniform financial accounting standards, and must submit to annual independent financial audits under sec. 119.23(7)(am), Stats. In addition, sec. 119.23 (9), Stats., requires the legislative audit bureau to perform a financial and performance evaluation audit of the program by January 15, 2000 which will be distributed to the chief clerk of each house of the legislature and to appropriate standing committees.

D. The Participating Schools

There are 122 private schools in the city of Milwaukee that would have been eligible to participate in the Amended MPCP during the 1995-96 school year. *See* Agreed Upon Statements of Facts, ¶ 24. Of course, 89 are sectarian and 33 are nonsectarian. *Id.*, ¶ 25. Approximately 84 percent of the pupils who attend private schools in Milwaukee during the 1994-95 school year attended religious schools. *Id.*, ¶ 26.

The parties have provided the Court, as part of the Agreed Upon Statement of Facts, the mission statements and other written materials prepared by many of the religious schools that notified the Superintendent of Public Instruction of their intent to participate in the Amended MPCP during the 1995-96 school year. *Id.*, ¶ 27, Exhibit E. The participating schools announce forthrightly that their mission is religious and that religious doctrine will be instilled in their students:

- "Oklahoma Avenue Luthern School in an integral part of the ministry of Oklahoma Avenue Lutheran Church." Exhibit E to Agreed Upon Statement of Facts, p. 535.
- "The mission of St. Leo and St. Rose Catholic schools is to share in the parish evangelization effort through providing quality Catholic education in grades pre-kindergarten through eight." *Id.* at 720.

- "The continuing purpose of St. Matthew Ev. Lutheran Church and School is to go and tell the pure Gospel of Jesus Christ for the conversion of unbelievers and the strengthening of believers in faith and Christian living." *Id.* at 750.
- "St. Pauls Lutheran School exists to:

  —assist parents in training children in God's ways,

  —teach God's Word to children, and

  —make disciples of children." *Id.* at 790.
- "We believe our school exists to carry out the Savior's command to "go and make disciples" (Matthew 28:19). Consequently, our school's primary reason for existence is to be a tool for bringing young souls to faith in Jesus. . . ." *Id.* at 275 (Fairview Lutheran School).
- "A prospective student whose parents are not members of a church will be considered as mission prospects. Christ Lutheran Church/School considers it a responshibility to teach the Word of God to those who have not heard this blessed Word." *Id.* at 198.
- "The objectives of the [Clara Muhammad School] are:

  1. To foster within each student the principle of submissions to the will of Allah (God) as the essential element in achieving human excellence." *Id.* at 227.
- "Holy Redeemer Christian Academy is an integral part of the ministry of Holy Redeemer Church of God in Christ." *Id.* at 399.
- "As a Catholic high school, [Divine Savior Holy Angels High School] is dedicated to promoting the

beliefs and traditions of the Catholic Church." *Id.* at 234.

- "The Yeshiva Elementary School of Milwaukee was initiated by members of the Orthodox Jewish Community with the following objectives as their goals:

  To teach elementary school children Torah and Mitzvos in accordance with the ideals and aspirations of Torah as espoused by the G'Dolei Yisroel in order to provide the excellence in Orthodox Jewish Education which will prepare our children to attend the finest seminaries, Yeshivas and institutions of Jewish higher learning." *Id.* at 966.

- "The function of St. Bernadette Day School is to provide for Christian individuals opportunities for growth in faith, for formation, for development." *Id.* at 614.

- "First and foremost Garden Homes Lutheran Church conducts and maintains a Christian elementary school to assist Christian parents in the training and nurturing of their children in the Word of God." *Id.* at 316.

As the schools' literature emphasizes, one of the primary means by which these schools accomplish their religious missions is by integrating the religious and secular aspects of the schools' educational programs.

- "In keeping with the purpose of our school, our curriculum is taught in the setting of God's Word. Religion is not only taught as a subject, but our teachers have been trained to integrate God's word across the curriculum. . . . Our curriculum offerings place Christ as the focal point for all study." *Id.* at 414, 417 (The Lutheran Chapel of The Cross Church and School).

- "Each class is taught by a dedicated Christian teacher who believes in Biblical concepts of salvation. Teachers strive to build into the curriculum a philosophy of Christian living that includes moral and spiritual values." *Id.* at 471 (Milwaukee Junior Academy (Seventh-day Adventist)).
- "Emmaus Lutheran Church and School is a Christian institution, *NOT* a private school. The Holy Gospel is the center of our curriculum." *Id.* at 259.
- "[E]verything that confronts the child in the educational program offered by St. Matthew Ev. Lutheran School will be presented in the light of His inspired, inerrant word of truth and power." *Id.* at 750.
- "The children will be thoroughly trained in the fundamental subject areas needed for a successful life here on this earth. It is our aim that these subjects be taught in accordance to Scripture and that all things related to the children's educational life be permeated with God's Word." *Id.* at 792 (St. Paul's Lutheran School).
- "Christian teachings are fostered in all classes, but especially in the religion program." *Id.* at 106 (All Saints Catholic Elementary School).
- At St. Veronica Catholic Elementary School, "Christian-Centered Education" means "Integrating Catholic faith in all academic areas." *Id.* at 841.
- "The students of St. Alexander's are not only taught the basic truths of their religion; they are also exposed to the Christian attitudes and ideologies which pervade their school environment." *Id.* at 553.

- "The message of Jesus is taught in religion classes and other curricular areas. . . . Because of the nature of a Catholic school, religion is taught daily as part of the curriculum. Catholic values are also incorporated into all other aspects of the curriculum." *Id.* at 614, 617 (St. Bernadette School).

- "The Bible forms the core and center upon which all instruction is based. Each day is opened with a devotion followed by instruction in Christian doctrine and Bible study. Our school gives due instruction in all branches of academics, which are required by the State of Wisconsin. All subjects are taught by a Christian teacher in the light of God's Word, emphasizing God's love for all men through Jesus." *Id.* at 131 (Bethlehem Lutheran School).

- "All subject areas in our school are Christ-centered." *Id.* at 323 (Gospel Lutheran School).

- "We Believe . . . that the Christian School, where every subject is taught from the Christian point of view, related to the teachings of Christianity and permeated with the spirit of Christianity, can be more successful in leading children to a vital Christian life than any other agency, except the Christian home." *Id.* at 534 (Oklahoma Avenue Lutheran School).

- "We teach all the traditional subjects, but we teach them differently—from a Christian perspective." *Id.* at 526 (Mount Olive Lutheran School).

As noted above, the Amended MPCP pays participating schools the lesser of the schools' per-pupil costs or the amount of the per-pupil state aid provided to MPS under sec. 121.08, Stats., which in the 1995-96 school year was approximately $3,667 and for the 1996-97 school year will

be about $4,400. The tuition charged by a majority of the religious schools that have applied to participate in the Amended MPCP, however, is less than either of those amounts. *See id.*, ¶ 30. As a result, a majority of the participating religious schools will receive more money from the state for each participating pupil than they charge in tuition.

Holy Cross School, for example, charges tuition of $1,475, while its "actual cost of education" is $2,446 per student. *See id.*, Exhibit E., p. 388. Emmaus Lutheran School charges $1,080 tuition to church members and $1,350 nonmembers, though its annual expenditures exceed $2,000 per pupil. *Id.* at 261. Mother of Good Counsel School reports that its tuition ($1,370 for parish members, $1,940 for nonmembers) "covers just half the cost of educating MGC students." *Id.* at 489, 497. Mount Olive Lutheran School states that the tuition charged even to non-members is "substantially less than our per pupil cost." *Id.* at 526.

Many religious schools depend on subsidies from their sponsoring churches to make up the difference between tuition and operating expenses. Bethlehem Lutheran School, for example, reports that "Bethlehem Lutheran Church subsidizes nearly 50% of the cost per student." *Id.* at 130. Mount Olive Lutheran School states that "Mount Olive congregation provides the major support since the focus of our school is Christian education." *Id.* at 526. St. Catherine School says that it "is partially subsidized by the parish at large." *Id.* at 663.[2] Because the

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[2] One of the most detailed descriptions of the support provided by a sponsoring church to its school comes from St. Bernadette Parish Day School:

> "2. St. Bernadette Church contributes without charge to the day school program the use of all parish buildings, facilities, and grounds, as well as all maintenance and repair

Amended MPCP pays schools more than what they charge in tuition, the Choice Program relieves the churches that sponsor the schools of at least part of the cost of subsidizing the difference between tuition received and the actual cost of education.

DISCUSSION

Article I, Sec. 18 of the Wisconsin Constitution

Plainttiffs' first claim the amended MPCP violates Art. 1, sec. 18 of the Wisconsin Constitution, which provides as follows:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishment, or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

Plaintiffs' claim focuses on two provisions: ". . . nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry without consent;" and ". . . nor shall any money be drawn from the

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costs ($22,489.78 last year); the cost of all utilities, ($38,-379.10 last year); building and grounds liability insurance, inspection fees, and licenses, ($11,370.76 last year); and the services of all parish based personnel, namely, the pastor, pastoral associate, parish secretary, and building engineer.

3. St. Bernadette Church provides a yearly cash subsidy to assist the day school program with school based expenses . . . not to exceed 25% of the total cost of all school based expenses. Last year the cash subsidy in behalf of the day school program was $66,140.36."

treasury for the benefit of religious societies, or religious or theological seminaries." These two provisions are commonly referred to as the "compelled support" clause and the "benefit" clause, respectively. Each clause will be discussed in turn.

A. The Benefit Clause

The proper analysis for determining whether the amended MPCP is constitutional as to the sectarian schools is set forth in the seminal United States Supreme Court decision of *Lemon v. Kurtzman*, 403 U.S. 602 (1971): The statute must have a secular legislative purpose; its primary effect must neither advance nor inhibit religion; and it must not foster excessive governmental entanglement with religion. *Id.* at 612-13. *See also, Tilton v. Richardson*, 403 U.S. 672 (1971); *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316, 198 N.W.2d 650, (1972); *State ex rel. Wisconsin Health Facilities Authority v. Lindner*, 91 Wis. 2d 145, 280 N.W.2d 773 (1979). Our concern in this case is whether the primary effect of including sectarian schools in the amended MPCP advances religion. I conclude that it does.

In an attempt to give some organization to the Wisconsin cases applying the *Lemon* test to Article I, Sec. 18 controversies, I provide the following analytical framework. We look to three factors to determine whether the amended MPCP meets the "primary effect" prong of the *Lemon* test as it is applied in Wisconsin:

1. Does the legislation provide aid to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or it funds a specifically religious activity in an otherwise substantially secular setting[3]. *State ex rel. Warren v. Nusbaum*, 64 Wis. 2d 314, 325, 219 N.W.2d 577 (1974);

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[3]A possible 4th factor exists, neutrality, which is part of the U.S. Supreme Court's jurisprudence in Establishment Clause claims.

2. Does the legislation provide for *direct* governmental aid to a sectarian institution. *State ex rel. Reynolds v. Nusbaum,* 17 Wis. 2d 148, 115 N.W.2d 761 (1962); and

3. Who are the primary beneficiaries of this funding. *Id.*

Each factor will be discussed in turn. However, before we do that, it is necessary to clarify the scope of this court's analysis of Article I, Sec. 18 in light of federal court decisions interpreting the Establishment Clause of the First Amendment.

At issue is whether the language of Article I, Sec. 18 provides an independent and more prohibitive basis for review of "benefit" clause and "compelling support" clause claims than is provided by federal jurisprudence of the Establishment Clause of the First Amendment. Based on a review of the historical context within which Article I, Sec. 18 was created and how it has been interpreted in the past 107 years I conclude it does.

A usual starting point for this type of discussion is a review of the legislative history to determine the intent of the framers. As noted by Chief Justice Heffernan in his dissenting opinion in *King v. Village of Waunakee,* 185 Wis. 2d 25, 64, 517 N.W. 2d 671 (1994), the record of the 1847 constitutional convention provides little if any insight into the framers' intent when they created Article I, Sec. 18. *See,* 4 *Constitutional Series: The Attainment of Statehood* 228, 312, 334, 713-5 (Milo M. Quaife ed.

The Supreme Court employs this analysis separate from the *Lemon* test. Defendants argue the application of the neutrality analysis to Article I, sec. 18 because they believe Wisconsin courts are bound by all aspects of the U.S. Supreme Court's Establishment Clause analysis when interpreting Article I, sec. 18. As discussed below, this court rejects defendants' argument and does not apply the neutral legislation analysis to the facts of this case. Furthermore, no Wisconsin court has applied the neutrality analysis to Article I, sec. 18 claims.

1928). We must, therefore, look for an early case where the Wisconsin Supreme Court interpreted and applied Article I, Sec. 18.

State ex rel. Weiss v. District Board, 76 Wis. 177, 44 N.W. 967 (1890) served as the Wisconsin Supreme Court's opportunity to investigate the historical context within which Article I, Sec. 18 was created. *Weiss* also provides us with a first glimpse at how the pioneers of our courts construed this important constitutional provision.

At issue in *Weiss* was whether reading a Protestant Bible in the Edgerton schools constituted sectarian instruction in violation of Article X, sec. 3 and whether it infringed upon the right of Catholics the free exercise of their conscience in violation of Article I, Sec. 18. The *Weiss* court explained rather elaborately the historical context of the creation of Article I, sec. 18:

> The relations of church and state have been the subject of discussion for many centuries; and at certain times, and in certain nations of Europe, one particular sect has been the established church of the state, and at other times or in other nations the belief of some other sect has been the established religion—while other sects, not so favored, were either exterminated altogether or permitted to remain on conditions more or less disagreeable and humiliating. These discriminations naturally generated bitternerss, enmities, and even cruel war among brethren. Many of the early immigrants to this country had felt the despotism of such intolerance, and came hither in consequence of it. They came from different countries of Europe, and, consequently, had experienced different types of intolerance. Some of them were as narrow minded in such matters as their oppressors had been; and hence no sooner acquired civil power than they

> themselves became intolerant towards all sects except their own. . . .
>
> Wisconsin, as one of the later states admitted into the Union, having before it the experience of others, and probably in view of its heterogeneous population, . . . has in her organic law, probably furnished a more complete bar to any preference for, or discrimination against, any religious sect, organization, or society than any other state in the Union.

Id. at 205, 207-208. It is undoubtedly clear that the *Weiss* court was signaling to all concerned that in response to Wisconsin's unique history, the constitutional framers intended to provide strict protection to Wisconsin citizens in the exercise of their religious beliefs while at the same time placing great restrictions on the state with respect to compelling its citizens to support "any place of worship" and drawing funds from the treasury "for the benefit of religious societies, or religious or theological seminaries." *Id.* at 211-216.

The Court ruled that reading the Bible in public schools is "worship" within the meaning of the "compelling support" clause. *Id.* at 213. The Court further ruled that the school room in which the Bible is read is a "place of worship." *Id.*

The *Weiss* court further ruled that religious instruction in a public school renders that school a "religious seminary" within the meaning of Article I, Sec. 18. The Edgerton school district received state funds and because of that the Court found that "the money so drawn from the state treasury was for the benefit of religious schools," in violation of Article I, Sec. 18. *Id.* at 215.

The Wisconsin Supreme Court elaborated on *Weiss* in the case of *State ex rel. Reynolds v. Nusbaum,* 17 Wis. 2d 148, 115 N.W. 2d 761 (1962). In *Reynolds* plaintiffs claimed the state violated Article I, Sec. 18, the "benefits"

clause, when it enacted a statute requiring school boards to provide private school students with free transportation to and from the nearest public school. Following in the footsteps of *Weiss*, the *Reynolds* court construed "religious societies" to be synonymous with "religious organizations," and that the term "seminary" includes elementary and secondary schools. *Id.* at 156, (cites omitted). The Court concluded that the private schools involved were religious organizations and therefore "religious seminaries" within the meaning of Article I, Sec. 18. Finding that the private schools benefit from the state providing State funded transportation to private parochial school students, the statute was held to violate Article I, Sec. 18.

The *Reynolds* court was cognizant of the earlier U.S. Supreme Court decision in *Everson v. Board of Education*, 330 U.S. 1 (1947), where the Court upheld a New Jersey law permitting parental reimbursement for the cost to bus children to parochial schools, finding no violation of the Establishment Clause of the First Amendment. The *Reynolds* court rejected an argument by the Wisconsin Attorney General urging it to adopt the *Everson* analysis and apply it to Article I, Sec. 18, quoting from *Weiss* and holding "that the First amendment provision, which prohibits laws' respecting an establishment of religion,' lends itself to more flexibility of interpretation than the provision contained in the last clause of Sec. 18, Art. I, of the Wisconsin Constitution." *Id.* at 165.

The import of *Reynolds* lies in its clear pronouncement that Article I, sec. 18 provides greater limitations on the state's authority when providing aid to private religious schools than the First Amendment. This part of the *Reynolds* opinion has not been overruled by any subsequent decision.[4]

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[4] Defendants argue *Reynolds* has been repudiated as reflected by the evolution in Establishment Clause and "benefit" clause jurisprudence. No such clear pronouncement is articulated in any Wis-

In *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 170 N.W. 2d 790 (1969), the Court adopted the primary effect test which it noted was first announced in *Everson*, 330 U.S. 1. *Id.* at 227. The Court rejected an argument by the respondent that *Reynolds* rejected the primary effect test, explaining, "(g)ranting that Sec. 18, Art. I, of the Wisconsin Constitution is more prohibitive than the First Amendment of the federal constitution, it does not follow and we cannot read Sec. 18 as being so prohibitive as not to encompass the primary—effect test." *Id.*

This is the first case where the Court acknowledges the more prohibitive limitations of Article I, sec. 18 as opposed to the First Amendment, while adopting the primary effect test. Obviously, the *Warren* court found the two concepts congenial, as not in conflict with the other. *Lemon* had yet to be decided. Still, in Wisconsin it was clear that Article I, sec. 18, even when applying the primary effect test to it, afforded greater prohibitions than the First Amendment against state funding of private religious institutions.

The *Lemon* decision was handed down by the United States Supreme Court in 1971, as well as *Tilton v. Richardson*, 403 U.S. 672 (1971), wherein the *"Lemon"* test was adopted. The Wisconsin Supreme Court in *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316, 198 N.W. 2d 650 (1972) ("Nusbaum I") had its first full opportunity to comment on and apply the *Lemon* test to First Amendment claims. The court noted: "We are bound by the results and interpretation given the first amendment in these high court decisions (referring to *Tilton* and *Lemon*). Ours not to reason why; ours but to review and apply. That limited assignment is not made easier by apparent shifts in emphasis and differences between major-

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consin "benefit" clause or "compelled support" clause opinion. Hence, *Reynolds* is still good law in Wisconsin on this important point.

ity, plurality, concurring and dissenting opinions." *Id.* at 322.

In "Nusbaum I" a statuate was challenged which authorized a contractual relationship between the state and the School of Dentistry of Marquette University for the providing of dental education in the state's only dental school. The statute authorizing the contract placed no limitations on how the state funds were to be used. Some of the funds would go to Marquette University for its operating expenses, which conceivably could include expenditures made in support of its religious mission. A claim was brought under the First Amendment and Article I, Sec. 18.

The primary effect test was applied in "Nusbaum I" and the statute at issue was found unconstitutional. The court first recognized the "dual purpose" nature of the First Amendment and Article I, Sec. 18 religious provisions: prohibiting the "establishment" of religion and protecting the "free exercise" of religion. The court found the statute in the first instance, unconstitutional under the First Amendment, and hence unconstitutional under Article I, Sec. 18. No thorough discussion was undertaken concerning the stronger prohibitions of Article I, Sec. 18, nor did the Court employ a separate analysis under Article I, Sec. 18 as did the Court in *Reynolds* and *Weiss*. The court merely reiterated the accepted rule that "The crucial question . . . is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion. *Id.* at 333, quoting from *Tilton, Supra* at 679.

In *State ex rel. Warren v. Nusbaum,* 64 Wis. 2d 314, 219 N.W. 2d 577 (1974) ("Nusbaum II"), the court upheld the constitutionality of a law that required school districts to contract with private schools offering special education services to children with exceptional needs if those services could not be provided by public schools

or agencies. One significant restriction in the law, which is notably absent from the amended MPCP, was the governing board, faculty, student body and teachings of the private special education agency could not be "chosen or determined by any religious organization or for any sectarian purpose." *Id.* at 321. The court, referring to the secular nature of the service, held that the primary effect of the legislation was not to benefit religious organizations. *Id.* at 325-26.

Similar to *Nusbaum I*, the court in *Nusbaum II* applied the primary effect test first under the federal constitution. Having found no violation under the federal constitution the court had no difficulty finding no violation under the Wisconsin Constitution. Again, no independent analysis was undertaken of the more strict prohibitions of Article I, sec. 18. However, the *Nusbaum II* court was the first court in Wisconsin to state the following proposition:

> "Aid may normally be thought of as having the primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . ."

Id. at 325.

What follows from *Nusbaum I* and *Nusbaum II* are a line of cases involving the "benefits" clause where the court defers to federal jurisprudence generally, not exercising its right to determine the constitutionality of laws under the more strict provisions of Article I, Sec. 18, independent of the First Amendment. In these cases the Court simply applies Establishment Clause-primary jurisprudence to Article I, sec. 18 claims after first finding no violation of the federal constitution. The Court does not specifically, or implictly, reject the independent analysis of Article I, sec. 18 jurisprudence, as supported by *Weiss, Reynolds,* and *Warren. See, State ex el. Holt v. Thompson,* 66 Wis. 2d 659, 225 N.W. 2d 678 (1975) (a writ of mandamus petition challenging the constitu-

tionality of the "released time for religious instruction" act); *State ex rel. Wisconsin Health Facilities Authority v. Lindner*, 91 Wis. 2d 145, 280 N.W. 2d 773 (1979) (involving an act creating the "Authority" which finances improvements for private, nonprofit health care facilities through the sale of tax-exempt bonds; the primary effect of the act under the federal and Wisconsin constitutions was to provide aid to predominantly secular aspects of health care); *Freedom From Religion Foundation, Inc. v. Thompson*, 164 Wis. 2d 736, 476 N.W. 2d 318 (Ct. App. 1991) (an action challenging a legislative grant to St. Norbert College); *King v. Village of Waunakee*, 185 Wis. 2d 25 (1994) (an attack on a Christmas creche located on government property and maintained at government expense). However, in *State v. Miller*, 202 Wis. 2d 56, 549 N.W. 2d 235 (1996), the court reestablished in a firm and unequivocal way, the old rule established in *Weiss* and *Reynolds* that as to cases invoking the freedom of conscience provision of Article I, Sec. 18, its analysis, "is not constrained by the boundaries of protection the United States Supreme Court has set for the federal provision." *Id.* at 66. The court held "that our state constitution provides an independent basis on which to decide this case." *Id.*

In *Miller* the court explained:

> Nowhere in *King* did we hold that Article I, sec. 18 is subsumed by the First Amendment. Although we quoted with approval the court of appeals' comment that because both clauses serve the same dual purpose we will interpret our provision "in light of United States Supreme Court cases," that statement should not be read as an abandonment of our long-standing recognition that the language of the two documents is not the same. Some questions cannot be fully illuminated by the light of federal jurisprudence alone, but may require examination according to the dictates

> of the more expansive protections envisioned by our state constitution.

Id. at 63-64.

The freedom of conscience or religion provision of Article I, sec. 18 was the primary issue in *Miller*. Defendants argue a narrow interpretation of *Miller*, stating the Court's reiteration of the increased protections of Article I, sec. 18 are confined to freedom of conscience claims. A careful reading of *Miller* and its reasoning leads this court to a different conclusion.

The Court in *Miller* firmly repudiates any attempt by legal scholars and practitioners to read into *King* precisely what defendants are urging upon this court. The Court explains:

> Contrary to the reading ascribed to the *King* majority by both the dissent in that opinion (*King*, 185 Wis. 2d at 59-60) and the court of appeals in this instance (*Miller*, 196 Wis. 2d at 245), we did not repudiate a reading of the Wisconsin Constitution which provides stronger protection of religious freedom than that envisioned in the federal constitution. (footnote omitted). In fact, we explicitly stated that we reached our conclusion given the specific facts in *King*, "even assuming that" our state establishment provision might be " 'less flexible' than the First Amendment." (cites omitted).

Id. at 64. Article I, sec. 18 was implicated in *King* as well as the Establishment Clause of the First Amendment. It is clear that the Court in *King*, which the *Miller* Court clearly acknowledged, examined Article I, sec. 18 and determined that its more rigid protections against government support of religion did not preclude the erection and maintenance of a christian creche on government property. This is a clear signal that this Court still recognizes the "less flexible" nature of Article I, sec. 18 in relation to the

Establishment Clause of the First Amendment, and supports an independent analysis of "benefit" clause and "compelled support" clause claims under the Wisconsin Constitution.

We have every reason to extend the courts reasoning in *Miller* to all provisions contained in Article I, Sec. 18. First, those parts in *Weiss* and *Reynolds* finding and applying the greater restrictions in "benefits" clause and "compelled support" clause cases have not been overruled, implicitly nor explicitly. Secondly, the "state's unique history" as recognized by the drafters of our constitution applies equally to all portions of Article I, Sec. 18. Third, consistent with the need to evolve with changing times, we have observed in the past four to eight years a major effort to empower the states to determine their own destiny. Wisconsin has a strong constitution that has provided through time greater protections to individuals in the exercise of their religion while imposing clear constraints on the state's authority to provide financial aid to sectarian schools, agencies and organization.

I conclude, therefore, that there is an independent basis to analyze "benefit" clause and "compelled support" clause claims under Article I, sec. 18. While it is fruitful and prudent to interpret this provision "in light of United States Supreme Court cases," we are not bound by federal jurisprudence when analyzing our own constitutional provisions. We now move to an independent analysis of the ameded MPCP under Article I, sec. 18.

Factor 1: Does the legislation provide aid to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or it funds a specifically religious activity in an otherwise substantially secular setting? The answer is yes.

In *Weiss* and *Reynolds* the Court stated elementary and secondary schools providing religious or sectarian instruc-

tion are "religious seminaries" as that term is used in Article I, sec. 18. There is no dispute that the sectarian schools wishing to participate or which currently participate in the amended MPCP are "religious seminaries." There is also no dispute that the amended MPCP would provide state funds from the state treasury to those schools should the program be allowed to continue. The question before us is can these schools separate the secular activity of education from the nonsecular activity reflected in their religious missions.

Wisconsin and federal courts have generally acknowledged that elementary and secondary schools with a religious affiliation are pervasively sectarian. *See State ex rel. Wisconsin Health Facilities Authority v. Lindner*, 91 Wis. 2d 145, 156-57, *See also, Meek v. Pittenger*, 421 U.S. 349 (1975); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973). "The basis of this distinction is the recognition that the very purpose of many elementary and secondary schools is to provide an integrated secular and religious education. The schools are often devoted to the inculcation of religious values. *Wisconsin Health Facilities Authority*, at 156-57, citing *Meek*, 421 U.S. at 366.

In the first instance, we can assume as a matter of law that the elementary and secondary schools wishing to participate in the amended MPCP are pervasively sectarian. *Wisconsin Health Facilities Authority*, at 156-57. Then, when we review the stated missions of these schools as provided in the stipulated facts, their intent to inculcate their students with their religious doctrine is manifest. It is equally clear that it is impossible, under any scenario, for these schools to separate the secular function of education from their religious mission. Their very existence is to convert students to their religion and to proselytize their doctrine. We can easily conclude that the amended

MPCP would provide aid to institutions in which religion is so pervasive that a substantial portion of their functions are subsumed in their religious mission.

Factor 2: Does the legislation provide for direct governmental aid to a sectarian institution? The answer is yes.

This is perhaps the most controversial of the issues presented in this case. Plaintiffs argue that although the amended MPCP provides for "indirect" payments to the schools, direct government aid is still being provided to the religious schools. Defendants point to a long line of federal cases that stand for the proposition that government payments to parents to subsidize their child's education is "indirect" aid to the schools, thus not violative of the Establishment Clause.[5] This conclusion is buttressed by the ability of the parents to independently choose the schools at which their child will attend. In this case the parents choose the school and inform the state Superintendent. The state Superintendent sends a check directly to the school which must be restrictly endorsed by both the school and the parents.

It can hardly be said that this does not constitute direct aid to the sectarian schools. Although the U.S. Supreme Court has chosen to turn its head and ignore the real impact of such aid, this court refuses to accept that myth. Millions of dollars would be directed to religious institutions that are pervasively sectarian with a clear mission to indoctrinate Wisconsin students with their religious beliefs. Whether sent directly to the schools or sent directly to the schools with a mandate of restrictive endorsement by the parents, is irrelevant under Article I, sec. 18 which makes

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[5] *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 115 S.Ct. 2510 (1995); *Zobrest v. Catalina Foothilss Sch. Dist.*, 113 S.Ct. 2462 (1993); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); and *Muller v. Allen*, 463 U.S. 388 (1983).

no distinction as to how the "benefit" is provided. As stated earlier in this case, the state cannot do indirectly what it cannot do directly. And that is provide money from the state treasury to pervasively sectarian religious schools for the purpose of educating Wisconsin students.

Factor 3: Who are the primary beneficiaries of this funding?

The religious schools would be the primary beneficiaries of the government aid. The parents of students attending these schools will certainly gain a benefit. Indeed, such aid provides an inducement to the parents to send their children to the religious schools. However, the religious schools, which constitute approximately 89% of the private schools in the city of Milwaukee, would greatly benefit from the amended MPCP. *See* Agreed Upon Statement of Facts, ¶ 25. Millions of dollars would pour into their coffers, greatly enriching their ability to fulfill their religious missions.

In addition, state payments to participating religious schools under the amended MPCP are not limited to the tuition actually charged by the schools. The parties have stipulated that the tuition charged by a majority of the religious schools is less than the amount of state payment they would receive under the amended MPCP. *See* Agreed Upon Statement of Facts, ¶ 30. The amended MPCP places no limitations on how the money may be used, including teachers salaries and operating expenses. *Reynolds* and *Warren* forbid the use of government funds for operating expenses by religious institutions. Every dollar paid by the government exceeding the actual tuition provides a direct and substantial benefit to the religious schools.

B. The Compelled Support Clause

Article I, sec. 18 reads in pertinent part: ". . . nor shall any person be compelled to . . . support any place of wor-

ship or to maintain any ministry, without consent . . ." The amended MPCP violates the compelled support clause because it compels Wisconsin taxpayers to support religious schools providing pervasively sectarian instruction rendering them places of worship and to maintain ministries without their consent.

We have already discussed how the Court held in *Weiss, supra*, that Bible readings in public schools violates the "benefit" and the "compelled support" clauses. The Court found reading a Bible in public schools to constitute "worship" and by permitting this activity in the schools, the schools became "place(s) of worship" within the meaning of Article I, sec. 18. *Weiss*, 76 Wis. at 211-13. Bible reading in the public schools violates the compelled support clause because taxpayers of the school district with different religious beliefs were "compelled to aid in the erection of the school building in question, and also to aid in the support of the school maintained therein." *Id.* "Being thus compelled to aid in such erection and support, they have a legal right to object to its being used as a 'place of worship.'" *Id.*

The amended MPCP also compels support of places of worship without the consent of taxpayers. Religious elementary and secondary schools are pervasively sectarian, usually including religious worship and teachings in their institutions. There can be no question that the parochial schools are places of worship.

Tax dollars will be used to support these schools. As stated earlier, no limitations are placed on the use of the government aid. The schools may use these funds as operating expenses, to purchase religious writing for intsruction, or other similar uses. *See* Agreed Upon Statement of Facts, ¶ 28.

Perhaps the most offensive part of the amended MPCP is it compels Wisconsin citizens of varying religious faiths

to support schools with their tax dollars that proselytize students and attempt to inculcate them with beliefs contrary to their own. We do not object to the existence of parochial schools or that they attempt to spread their beliefs through their schools. They just cannot do it with state tax dollars.

Accordingly, the amended MPCP, by permitting religious schools to participate in the program, violates Article I, sec. 18 of the Wisconsin Constitution because the primary effect of the amended MPCP is to benefit the religious missions of the elementary and secondary religious schools and because it compels Wisconsin taxpayers to support places of worship without their consent.

Private or Local Bill, Article IV, sec. 18

Article IV, sec. 18 states, "(n)o private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." The purpose of this provision is:

1.) (T)o encourage the legislature to devote its time to the state at large, its primary responsibiilty;

2.) to avoid the specter of favoritism and discrimination, a potential which is inherent in laws of limited applicability; and

3.) to alert the public through its elected representatives to the real nature and subject matter of legislation under consideration.

Davis v. Grover, 166 Wis. 2d 501, 519, 480 N.W.2d 460 (1992); *Milwaukee Brewers Baseball Club v. Wisconsin Dep't of Health and Social Services*, 130 Wis. 2d 79, 107-08, 387 N.W.2d 254, 266 (1986). The legislature passed the amended MPCP as part of a voluminous budget bill. This reduces the legislature's accountability to the public and leaves the legislation susceptible to being challenged under Article IV, sec. 18. *See Davis v. Grover*, 166 Wis.

2d at 522. One of the principal concerns embodied in Article IV, sec. 18 is to avoid "internal logrolling" by the legislature. *Id.*, at 519, citing, *Brookfield v. Milwaukee Sewerage,* 144 Wis. 2d 896, 426 N.W.2d 591 (1988) (footnote omitted). "Multisubject bills by their nature are subject to a greater susceptibility of smuggling and log-rolling." *Id.* However, we realize that legislators may be forced by time constraints to pass legislation through multi-subject bills. *Id.* at 522. Therefore, this court has a duty to take a closer look at the legislation.

Determining whether the amended MPCP constitutes a private or local bill involves a two part analysis: 1.) whether the process in which the bill was passed deserves a presumption of constitutionality, and 2.) whether the bill is private or local. *Id.* at 520. If this court concludes that the amended MPCP constitutes a private or local bill, then Article IV, sec. 18 will apply, and the legislation must be passed as a single subject bill with the title clearly indicating the subject matter. *Id.*

First, this court must determine whether the process by which the amended MPCP was enacted deserves a presumption of constitutionality. "Although a statute generally enjoys a presumption of constitutionality, an exception to the rule occurs when the behavior of the legislature allegedly violates a law mandating the form in which bills must be enacted." *City of Oak Creek v. State Dep't of Natural Resources,* 185 Wis. 2d 424, 437, 518 N.W. 2d 276, 279 (Ct. App. 1994). *See, Davis v. Grover,* 166 Wis. 2d at 520. In this case, the amended MPCP was passed as part of the 1995 Budget Act instead of as a single subject bill. 1995 Wis. Act 27, sec. 4002-09. Furthermore, the amended MPCP portion of the 1995 Budget Act did not have a title clearly indicating its subject matter. Thus, the amended MPCP will only be presumed constitutional if evidence shows that the legislature adequately considered this legislation.

The original MPCP was law since 1990, and received a lot of attenion. When the legislature decided to amend the program, public hearings were held in Milwaukee, Madison, Cedarburg, Portgage, and River Falls. In addition, the Joint Committee on Finance debated the bill. Furthermore, the Assembly Committee on Urban Education and the Senate Education Committee held hearings regarding this legislation. This bill was also debated on the Assembly and Senate floor. Thus, this court concludes this legislation was not smuggled through the legislature by passing it as part of a voluminous budget bill.

Second, this court must determine whether the amended MPCP constitutes a private or local bill. There are three categories of legislation that can be challenged under the local bill provision. First, legislation that is specific on its face as to particular people, places or things. *See Davis,* 166 Wis. 2d at 524. Second, legislation that is not specific on its face, but involves prohibited classification under Article IV, sec. 31. *Id.* at 525. Third, legislation that is not specific on its face but creates a closed classification that limits it to a specific locality. *Id.* In this case, the amended MPCP falls within the third category, because it only applies to first class cities. At this time, Milwaukee is the only first class city in Wisconsin. Thus, we must analyze it under the test enunciated in *Brookfiield, supra.*

The elements of the *Brookfield* test are:

1. The classification employed by the legislature must be based on substantial distinctions which make one class really different from another;
2. The classification adopted must be germane to the purpose of the law;
3. The classification must not be based on existing circumstances only. Instead, the classification must be subject to being open, such that other cities could join the class.

4. When a law applies to a class, it must apply equally to all members of the class.

5. The characteristics of each class should be so far different from those of the other classes so as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Brookfield, 144 Wis. 2d at 907-09. This test analyzes the substance of the legislation in order to determine whether the procedural requirements of the local bill provision apply. *See Davis*, 166 Wis. 2d at 526. In *Davis*, the court found that the original MPCP met all five elements. *Id.* at 527-37.[6] The parties dispute whether the program still meets the second element under the amended MPCP. No other element of the *Brookfield* test is at issue.

The plaintiffs contend the adopted classification of first class cities is no longer germane to the purpose of the law. When determining whether the first class city classification was germane to the purpose of the law under the original MPCP, the trial court, the court of appeals, and the Wisconsin Supreme Court in *Davis* concluded that "the only reasonable inference to be drawn from the MPCP was that it was an experiment intended to address a perceived problem of inadequate educational opportunities for disadvantaged children." *Id.* at 530. The parties do not dispute that improving education in Wisconsin is of statewide importance, nor that a first class city is the best place to experiment with alternative forms of education. However, they do disagree on whether the amended MPCP still constitutes an experi-

[6] It is the rare opportunity to have a case to refer to which is almost entirely similar on the issues as *Davis v. Grover*. *Davis* is the predecessor of this case which, in part, addressed this issue. Hence, it behooves us to consider the Court's analysis in that case to determine whether the primary bases for its holding is present in this case.

ment. In *Davis,* the court focused on two features of the program to indicate its experimental nature: the small size of the program and the extensive data compilation and reporting requirements. *Id.* at 533-34. The plaintiffs contend the program no longer constitutes an experiment, because the amended MPCP substantially expanded the size of the program and severely reduced the data compilation requirements.

First, the *Davis* court stated, "the program is not an abandonment of the public school system. Rather, the MPCP would affect at most only 1 percent of the students in the MPS, giving the program a very small window of opportunity to test the effectiveness of an alternative to the MPS." *Id.* at 533. Since *Davis v. Grover* was decided, the program has expanded to include up to 15% of the students in the MPS. Allowing 15,000 students to participate in this program can no longer be considered "a small window of opportunity." Nonetheless, expanding the number of participating students and schools increases the state's ability to assess the effectiveness of educational choice and to evaluate different models. "The success of the program is dependent upon the participation of numerous and diverse nonsectarian private schools such that the fate of the program does not rest on the operations of one or a few schools." *Id.* at 534.

Second, the *Davis* court found that "the MPCP creates an extensive data compilation and reporting process which the state can use to measure the effects of choice and competition in education." *Id.* at 533. However, the amended MPCP eliminated sec. 119.23(5)(d), Stats., which required the superintendent to prepare and circulate "a report comparing the academic achievement, daily attendance record, percentage of dropouts, percentage of pupils suspended and expelled and parental involvement activities" of pupils participating in the MPCP with those attending public schools in Milwaukee. 1995

Wis. Act 27, sec. 4007m. The amended MPCP also eliminated sec. 119.23(9)(a), Stats., which authorized the superintendent to "conduct one or more financial or performance evaluations, audits, or both." Section 119.23(9), Stats., is the only remaining evaluative component of the MPCP. This statute requires the legislative audit bureau to conduct a financial and performance evaluation audit of the program by January 15, 2000 to submit to the chief clerk of each house of the legislature. *Id.*

Without regular evaluation of the MPCP, this court questions its experimental nature. Experiments are executed to test a certain hypothesis. However, how can the state test the hypothesis that choice improves education without providing for routine and systematic data collection and compilation? No provision in the amended MPCP is provided to enable the state to make meaningful comparisons between students who participate in this program with those attending public schools. The primary provision for such data compilation and comparison was repealed by the amended MPCP, sec. 119.23(5)(d), Stats. Thus, this court finds that the amended MPCP is no longer an experiment. The legislature, by repealing sec. 119.23 (5)(d), Stats., eliminated one of the two principal bases upon which the *Davis* court relied in finding the Original MPCP constitutional under Article IV, sec. 18.

Furthermore, this court is not aware of any other features of the amended MPCP that make the first class city classification germane to the purpose of the law. We agree that a first class city is the best place to test experimental forms of education. However, if the program is no longer experimental, it will not benefit children outside of Milwaukee. The existence of so many private schools in the City of Milwaukee becomes completely irrelevant if no significant data compilation system exists. Thus, it no longer serves a statewide purpose, and is no longer "ger-

mane to the purpose of the law." Therefore, this court finds the amended MPCP is a local or private bill enacted in violation of Article IV, sec. 18.

Public Purpose Doctrine

Another challenge to the constitutionality of the amended MPCP involves the application of the public purpose doctrine. The public purpose doctrine states that public expenditures may be made only for public purposes. "An expenditure of public funds for other than a public purpose would be abhorrent to the constitution of Wisconsin." *See State ex rel. Warren v. Nusbaum*, 59 Wis. 2d at 414. Although the public purpose doctrine is not an express provision of the Wisconsin Constitution, it is firmly accepted as a basic constitutional tenet. *See State ex rel. Bowman v. Barczak*, 34 Wis. 2d 57, 62, 148 N.W.2d 683, 684 (1967).

Several theories exist regarding the origin of the public purpose doctrine. The Wisconsin Supreme Court has attributed its development to the due process and equal protection clauses of the state and federal constitutions. *See State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147, 175, 277 N.W. 278 (1938). In *Heimerl v. Ozaukee County*, 256 Wis. 151, 158, 40 N.W.2d 564, 567 (1949), the Wisconsin Supreme Court attributed it to U.S. Const. art. IV, sec. 4 stating, "(t)axation for the private purpose is prohibited by the clause of the federal constitution that guarantees to every state a Republican form of government, as such a form of government forbids the raising of taxes for anything but a public purpose." Furthermore, Wis. Const. Article VIII, sec. 2, provides that no money shall be paid out of the treasury except in pursuance of an appropriation by law. *See State ex rel. La Follette v. Reuter*, 33 Wis. 2d 384, 147 N.W.2d 304 (1967). Finally, others trace the doctrine to a "judicial articulation of the belief that governmental power should be used for the benefit of the entire

community." *See* Lewis R. Mills, *The Public Purpose Doctrine in Wisconsin*, 1957 Wis. L. Rev. 40, 40.

The difficulty arises in determining what constitutes a valid public purpose. "(W)hat constitutes a public purpose is in the first instance a question for the legislature to determine and its opinion should be given great weight." *State ex rel. Warren v. Reuter*, 44 Wis. 2d at 212. The court must recognize that "the hierarchy of community values is best determined by the will of the electorate" and that "legislative decisions are more representative of popular opinion because individuals have greater access to their legislative representatives." *Barczak*, 34 Wis. 2d at 65. Thus, the court "will not interfere unless at first blush the act appears to be so obviously designed in all its principal parts to benefit private persons and so indirectly or remotely to affect the public interest that it constitutes the taking of property of the taxpayers for private use." *Id.* at 64.

Furthermore, what constitutes a public purpose is not a static concept. *Id.* Over time, the scope of activities which may be classified as a valid public purpose has broadened. *See State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 54, 205 N.W.2d 784, 797 (1973). In *La Plante*, the following cases were cited to illustrate the steady growth of the public purpose doctrine under the decisions of the Wisconsin Supreme Court.

> In *State ex rel. Bowman v. Barczak, supra*, industrial development through agencies and bond issues, pursuant to sec. 59.071, Stats., was determined to be a valid constitutional enactment as it related to a declaration of public purpose. In *West Allis v. Milwaukee County*, 39 Wis. 2d 356, 159 N.W.2d 36 (1968), construction of incinerators and waste disposal facilities was considered a public purpose. In *State ex rel. Warren v. Reuter, supra*, financial aid to Marquette School of Medicine, a private non-

> profit corporation, was upheld upon the premise that public health is a public purpose.

Id. at 55.

The amended MPCP is similar to the original MPCP which was challenged in *Davis v. Grover*. In *Davis*, the Wisconsin Supreme Court held that the original MPCP did not violate the public purpose doctrine. *Id.* at 546. Thus, this court will begin by looking at the holding in that case.

In *Davis*, the court stated, "(n)o party disputes that education constitutes a valid public purpose, nor that private schools many be employed to further that purpose." *See id.* at 541. Thus, the only dispute between the parties was whether adequate controls existed to ensure the attainment of the public purpose.

The Wisconsin Supreme Court found that adequate controls did exist under the original MPCP. The court held that "(i)t simply does not matter how the school spends the money so long as it gives the participating student an education that complies with sec. 118.165, Stats., in return for the money." *Id.* at 542. Section 118.165, Stats., requires private schools to:

1.) be organized to primarily provide private or religious-based education;

2.) be privately controlled;

3.) provide at least 875 hours of instruction each school year;

4.) provide a sequentially progressive curriculum of fundamental instructions in reading, language arts, mathematics, social studies, science, and health;

5.) not be operated or instituted for the purpose of of avoiding or circumventing compulsory school attendance; and

6.) have pupils return home not less than two months of each year unless the institution is also licensed as a child welfare agency.

The court further cited the additional reporting requirements included in the program. They noted that the state superintendent had to prepare an annual report for the legislature which compared data on children who participated in the original MPCP with students who attended Milwaukee public schools in the following areas: academic achievement, daily attendance, percentage of dropouts, and percentage of pupils suspended and expelled. *Id.* at 544. Detailed reports and evaluations were also generated by the program. The original MPCP authorized the state superintendent and required the Legislative Audit Bureau to conduct financial and performance audits on the program. *Id.*

Finally, the court recognized the importance of parental choice in controlling the education received by students participating in the original program. The court stated:

> Parents generally know their children better than anyone. The program allows participating parents to choose a school with an environment that matches their child's personality, with a curriculum that matches their child's interest and needs, and with a location that is convenient. If the private school does not meet the parents' expectations, the parents may remove the child from the school and go elsewhere. In this way, parental choice preserves accountability for the best interests of the children.

Id.

In *Davis*, the court compared the original MPCP to the situation in *Reuter*. *Id.* at 542. In that case, the court upheld an appropriation of public funds to Marquette Medical School for the purpose of providing quality medical education in Wisconsin. *Id.* However, Marquette Medical School was required to use the funds for "medical education, teaching, and research." *Id.* Under the original

MPCP, sec. 119.23 Stats., did not provide any requirements on how the funds provided to the participating schools had to be spent. *Id.* Nonetheless, the court found there was adequate control since the schools were required to provide an education complying with the statutory requirements for private schools. *Id.* The court also addressed the challenge that the Marquette Medical School was "accredited by an independent national organization as well as federal and state agencies" while schools participating in the original MPCP were not required to demonstrate that they were providing quality education. *Id.* The court found that the requirements of the program along with parental choice provided adequate controls.

In *Davis*, the court used a two step analysis to determine whether the public purpose doctrine had been violated: 1.) whether there was a valid public purpose and 2.) if so, whether there was adequate control and accountability to ensure the attainment of the public purpose. *Id.* at 540-45. This court will begin by applying the same analysis to the amended MPCP.

First, "(n)o party disputes that education constitutes a valid public purpose, nor that private schools may be employed to further that purpose." *Id.* at 541. The only relevant change under the amended MPCP is the addition of sectarian schools. Nonetheless, all participating children still receive an education. "We cannot take the short rather than the long view of the problem because a private school is used as a means to attain the end." *State ex rel. Warren*, 44 Wis. 2d at 214. Indeed, expanding the MPCP enhances this public purpose by allowing more students to participate in the program.

Secondly, this court must consider whether there are adequate controls to ensure the attainment of the public purpose. The amended MPCP eliminated some of the reporting requirements. However, "(o)nly such control and accountability as is reasonably necessary under the circum-

stances to attain the public purpose is required." *Id.* at 216. In *Davis*, the court found that reasonable controls existed. This court finds that adequate controls still exist.

Under the original MPCP, there were no express limitations on the use of the funds paid to the participating schools. The Wisconsin Supreme Court held that "(i)t simply does not matter how the school spends the money so long as it gives the participating student an education that complies with sec. 118.165, Stats., in return for the money." *Davis* at 542. Under the amended MPCP the participating schools must still comply with sec. 118.165, Stats., which ensures a sequentially progressive curriculum. Ensuring a sequentially progressive curriculum ensures the attainment of the public purpose.

In addition, the amended MPCP still contains several reporting requirements. The amended MPCP eliminated sec. 119.23(5)(d) Stats., requiring the state superintendent to submit an annual report to the legislature comparing students participating in the program with students attending Milwaukee public schools. It also eliminated the state superintendent's authority to conduct financial and performance audits under sec. 119.23(9)(a) Stats. However, these reporting requirements are unnecessary to ensure the attainment of the public purpose. The court's only concern is that the controls ensure that participating students receive an education. Participating schools must still submit to an annual independent financial audit under sec. 119.23(7), Stats. Furthermore, the legislative audit bureau must submit a fiancial and performance audit of the program to the chief clerk of each house of the legislature, for distrbution to appropriate standing committees, by January 15, 2000 under sec. 119.23(9)), Stats.

Finally, parental choice still exists. The theory behind this program is that "less bureaucracy coupled with parental choice improves educational quality" since "parental choice preserves accountability for the best interests of the

children." *Davis* at 544-45. Wisconsin recognizes that parents are "the persons under natural conditions having the most effective motives and inclinations and being in the best position and under the strongest obligation to give to such children proper nurture, education, and training." *See Wisconsin Indus. Sch. for Girls v. Clark County*, 103 Wis. 651, 668-69, 79 N.W. 422, 428 (1899).

Under the analysis used in *Davis*, education still constitutes a valid public purpose, and adequate controls still exist. However, there are times when using the traditional framework is unnecessary. The amended MPCP uses both sectarian and nonsectarian schools to educate participating students. Clearly the legislature may use private institutions to achieve a public purpose. Nonetheless, the religious education provided by the participating sectarian schools does not serve a valid public purpose. Using sectarian schools to provide religious education with public money so blatantly violates the public purpose doctrine that it requires this court to go outside the traditional analysis.

The legislature has wide discretion to determine what constitutes a public purpose, but the constitution clearly calls for a separation of church and state. "(T)he constitutional question remains as to how far the court should go in deferring to the conclusions of the legislature." *Barczak*, 34 Wis. 2d at 65. When leigslation is challenged, the court has an "unavoidable burden under the constitution to examine such legislation and to assess its realistic operations." *Id.* at 65-66, quoting *David Jeffrey Co. v. Milwaukee*, 267 Wis. 559, 578, 66 N.W.2d 362 (1954). "Although the legislative declarations are entitled to great weight, we may not blindly accept at full value even the most elaborate prefatory expressions concerning community need, economic impact, or public purpose." *Id.*

Normally "(w)e are not concerned with the 'wisdom, merits or practicability of the legislature's enactment.'"

See Millers Nat'l Ins. Co. v. City of Milwaukee, 184 Wis. 2d 155, 175, 516 N.W.2d 376, 383 quoting *Hopper v. Madison*, 79 Wis. 2d 120, 128-29, 256 N.W.2d 139 (1977). In reviewing a "legislative expenditure of public funds, there is a strong presumption that a legislature's acts are constitutional, and it is the duty of this court, if possible, to construe a legislative enactment as to find it in harmony with constitutional principals." *See Id.* However, the legislature exceeded their role by funding religious education with public funds, and this court can not defer to the legislature's expression of public purpose.

Sectarian schools make up the majority of the participating schools in the amended MPCP. During the 1994-95 school year, 84% of the participating students attended religious schools. Education in sectarian schools contain two components: 1.) secular instruction and 2.) religious instruction. The mission statements of the religious schoools clearly indicate that their function is to promote religion. Secular instruction in these schools intertwines worship and religious indoctrination designed to advance their religious goals. Furthermore, most schools receive more than they charge for tuition, and there are no restrictions on how the schools spend this money. Thus, public money inevitably goes to fund religious education and activities.

The public purpose doctrine clearly states that public funds may "only" be used for public purposes. Granted, the public purpose doctrine does not include an establishment clause component. Nevertheless, there are no cases upholding government funding of religious activities as a valid public purpose.

> The test to be applied in determining whether a particular agency may be employed by the state or some particular subdivision thereof by legislative authorization, to perform any particular work, is not whether the agency is public, but whether the purpose

> is public within the legitimate function of our constitutional government. If the purpose be public and constitutional, and the agency be an appropriate means to accomplish it, and not expressly or by necessary implication prohibited by state or national constitution, its employment, under reasonable regulations for control and accountability to secure public interests, is legitimate and constitutional.

See Wisconsin Indus. Sch. for Girls, 103 Wis. at 667. The fact that the establishment clause and Article 1, sec. 18 make funding religious activities with public money unconstitutional leads to the conclusion that sectarian schools providing religious education can not be used to achieve the public purpose of educating students.

Using the traditional analysis, the amended MPCP remains constitutional under the public purpose doctrine. This holds true for nonsectarian schools. However, religious education does not constitute a valid public purpose. Thus, the use of sectarian schools is unconstitutional under the public purpose doctrine.

Uniformity Clause, Article X, sec. 3

The amended MPCP has been challenged as violating the uniformity clause, Article X, sec. 3. The uniformity clause provides:

> (t)he legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours.

Article X, sec. 3. This court will apply a two step analysis to determine whether the uniformity clause has been violated: 1.) whether participating schools are district schools, and 2.) if so, whether the character of instruction is uniform.

The first issue revolves around the definition of "district school." The Wisconsin Constitution does not specifically define the term "district school." We can look to the intent of the framers of the Wisconsin Constitution, but defining what constitutes a district school did not appear to be their primary concern.

> An examination of the debates in the conventions that framed our present constitution and the constitution of 1846 (which contained a similar provision) discloses that the members of those conventions, when they were framing the article relating to schools, were concerned, not with the method of forming school districts, but with the character of instruction that should be given in those schools after the districts were formed,—with the training that these schools should give to the future citizens of Wisconsin.
>
> Viewing the terms of this constitutional provision in light of its express terms as well as of the purpose which actuated those who drafted it, we conclude that the requirement as to uniformity applies to the districts after they are formed,—to the character of the instruction given,—rather than to the means by which they are established and their boundaries fixed.

See Kukor v. Grover, 148 Wis. 2d 469, 486, 436 N.W. 2d 568, 575 (1989), *citing, State ex rel. Zilisch v. Auer,* 197 Wis. 284, 289-90, 223 N.W. 123 (1928).

Furthermore, in *Davis,* the court clearly rejected the theory that any school that accepts public money becomes a district school. *Davis,* at 539-40. The court stated:

> This theory flies directly in the face of past decisions by this court. In *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 170 N.W.2d 790 (1969), we held that the appropriation of public funds to a private entity need only be accompanied by such controls as are necessary to fulfill the public purpose required. Depending on the circumstances, these controls do not necessarily have to be the same as those regulating similar public agencies.

Id. Thus, participating schools are not automatically district schools.

The amended MPCP is similar to the original MPCP which was challenged in *Davis*. *Id.* In that case, the Wisconsin Supreme Court found that the original MPCP did not violate the uniformity clause. *Id.* at 539. This court will look at the analysis used in that case.

In *Davis*, the court held that participating schools were not required to provide uniform education, because they did not constitute district schools for the purpose of the uniformity clause. *Id.* at 538. The court noted that the original MPCP unambiguously referred to "private schools" which has a specific statutory meaning. *Id.* at 538. Section 15.001(3r), Stats., defines a private school as "an institution with a private educational program that meets all of the criteria under s. 118.165(1) or is determined to be a private school by the state superintendent under s. 118.167." In deciding this issue, the Wisconsin Supreme Court stated, "(w)e assume that the legislature was aware of this statutory meaning and intended to use 'private school' . . . as a stautory term of art." *Davis* at 538.

Furthermore, in *Davis*, the court determined that the original MPCP did not deprive any student of the opportunity to attend a public school providing uniform education. *Id.* at 538. They cited to the fact that all students participating in the program have the option to

"withdraw at any time and return to a public school." *Id.* The court concluded that the original MPCP merely reflected "a legislative desire to do more than that which is constitutionally mandated." *Id.*

The court has clearly established the principal that the uniformity clause creates a floor and not a ceiling for legislative action. *See, e.g., Zweifel v. Joint Dist. No. 1, Belleville,* 76 Wis. 2d 648, 251 N.W.2d 822 (1977). In *Davis,* the court looked at the following cases to illustrate this point. *Davis* at 538. In *Comstock v. Joint Sch. Dist. No. 1,* 65 Wis. 631, 636-37, 27 N.W. 829 (1888), the Wisconsin Supreme Court found a statute allowing school districts to admit nonresident school children constitutional under the uniformity clause. The court declared, "when the legislature has provided for each such child the privileges of a district school, which he or she may freely enjoy, the constitutional requirement in that behalf is complied with." *Id.* Furthermore, in *Kukor,* the Wisconsin Supreme Court found that a legislative formula used to determine the amount of state aid to public school districts was constitutional under the uniformity clause, because the students had the opportunity to attend public school providing uniform instruction. *Kukor* at 496-97.

This court must follow the reasoning applied in *Davis,* unless the amended MPCP can be clearly ditinguished from the original MPCP. However, little has changed from the original MPCP with respect to the uniformity clause.

Choice opponents argue the schools participating in the amended MPCP no longer constitute district schools since the legislature significantly expanded the program. Instead of being a small, experimental program, choice opponents claim that private schools are becoming a significant and integral part of the required system. That may be so, but it is irrelevant under the *Davis* analysis. The legislature still refers to the participating schools as "private schools" which still has a specific statutory defi-

nition. The amended MPCP does not change this language in any way. Even where private schools are created by an act of the legislature, they remain private as long as the institution retains control. *See Attorney General ex rel. Saunders v. Albion Academy & Normal Institute*, 52 Wis. 469, 9 N.W. 391 (1881). Under the amended MPCP, ownership and control has not been transferred to the state.

In addition, students may still withdraw at any time to return to public schools. The uniformity clause does not require the legislature to ensure that all children in Wisconsin actually receive a free uniform basic education. *Davis* at 538. The legislature must merely ensure that all children have the opportunity to receive a free uniform basic education, and the amended MPCP in no way prevents this. *Id.* Once the legislature meets this requirement, they are free to add to the basic foundation required by the uniformity clause. *Id.* at 539.

Choice opponents further cite to the fact that private schools may now receive all of their funding through public money just like any other district school that must comply with the uniformity clause. As the program was originally enacted, no school could receive more than half of its funds from the state. This restriction was repealed. Nonetheless, the notion that schools receiving public money are transformed into district schools was clearly rejected in *Davis. Id.*

The 1995 amendments to the MPCP do not change the analysis applied to the original MPCP. Thus, this court finds no compelling reason to depart from the holding in *Davis.* Schools participating in the amended MPCP are not district schools so they are not required to provide uniform education nor restricted from providing sectarian instruction. Therefore, the amended MPCP does not violate the uniformiy clause, Article X, sec. 3.

CONCLUSION

For the above reasons this court holds that the amended MPCP violates Article I, sec. 18, Article IV, sec. 18, and the private purpose doctrine as applied to the sectarian schools. The amended MPCP is constitutional under Article X, sec. 3 and the private purpose doctrine as applied to nonsectarian schools. Summary judgment is granted in favor of plaintiffs and the State of Wisconsin is ordered to terminate the amended Milwaukee Parental Choice Program accordingly. By stipulation this order is stayed until the close of the 1996-97 school year.

Dated: January 15, 1997.

BY THE COURT:

/s/ Paul B. Higginbotham
PAUL B. HIGGINBOTHAM
Circuit Judge

This opinion was written with the assistance of Jennifer Hanneman

APPENDIX D

[Filed Mar 29,1996]

IN THE SUPREME COURT
STATE OF WISCONSIN

No. 95-2153-OA

STATE OF WISCONSIN EX REL. TOMMY G. THOMPSON, GOVERNOR, STATE OF WISCONSIN,
Petitioner,

JOHN T. BENSON, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION AND JAMES E. DOYLE, ATTORNEY GENERAL,
Necessary-Parties,

MARQUELLE MILLER, CYNTHIA MILLER, ANGELA GRAY, ZACHERY GRAY, SHON RICHARDSON, GEORGE RICHARDSON, LATRISHA HENRY, FAYE HENRY, REIGNE BARRETT, VALERIE BARRETT, CANDICE WILLIAMS, SENTON WILLIAMS, CLINTRAI GILES, SHARON GILES, PARENTS FOR SCHOOL CHOICE, PILAR GONZALEZ, DINAH COOLEY, JULIE VOGEL, KATE HELSPER, BLONG YANG, GAIL CROCKETT, YOLANDA LASSITER AND JEANINE KNOX,
Necessary-Parties-Intervening-Petitioners,

REP. ANNETTE POLLY WILLIAMS,
Intervenor-Petitioner,

v.

WARNER JACKSON, JENNIFER EVANS, WENDELL HARRIS, THE REVEREND ANDREW KENNEDY, RABBI ISSAC SEROTTA, CEILANN LIBBER, FATHER THOMAS J. MUELLER, REVEREND JOHN N. GREGG, DIANE BREWER,

COLLEEN BEAMAN, MARY MORRIS, PENNY MORSE, KATHLEEN JONES, PHILIP JONES, MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, BY ITS PRESIDENT, M. CHARLES HOWARD, MICHAEL LANGYEL, DONALD LUCIER, TRACY ADAMS, MILWAUKEE PUBLIC SCHOOLS ADMINISTRATORS AND SUPERVISORS COUNCIL, INC., BY ITS EXECUTIVE DIRECTOR, CARL A. GOBEL, PEOPLE FOR THE AMERICAN WAY, BY ITS EXECUTIVE VICE PRESIDENT AND LEGAL DIRECTOR, ELLIOTT M. MINCBERG, JOHN DREW, SUSAN ENDRESS, RICHARD RILEY, JEANETTE ROBERTSON, VINCENT KNOX, BERTHA ZAMUDIO, JAMES JOHNSON, ROBERT ULLMAN AND SALLY F. MILLS,

Respondents.

PER CURIAM. The court is equally divided. Chief Justice Day, Justice Abrahamson and Justice Bablitch believe that the amendments to the Milwaukee Parental Choice Program (MPCP) are contrary to art. 1, § 18 and art. X, § 3 of the Wisconsin Constitution.[1]

Justice Steinmetz, Justice Wilcox and Justice Geske believe, based both upon the legislation before us and the stipulated facts, that respondents have not met the burden to prove beyond a reasonable doubt that the legislative amendments to MPCP violate the Establishment Clause of the First Amendment to the U.S. Const., art. I, § 18 of the Wis. Const., art. X, § 3 of the Wis. Const. or Wisconsin's Public Purpose Doctrine.[2]

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[1] Because these three justices would hold the expanded MPCP program unconstitutional under the Wisconsin Constitution, they would not reach the issue of whether it should also be found unconstitutional under the United States Constitution.

[2] The original program withstood challenges brought on a variety of state constitutional bases in *Davis v. Grover*, 166 Wis. 2d 501, 512, 480 N.W.2d 460 (1992), in part because the majority of this court concluded that the program was experimental in nature and served to advance the goal of improving "the quality of education in Wisconsin for children of low-income families." Justices Stein-

A majority of the participating judges must agree on a particular point for it to be considered the opinion of the court. *State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995). Conversely, when the court splits evenly, as is the case here, the court would ordinarily affirm the court of appeals' decision if the case was before the court on appeal, or remand to the court of appeals for further proceedings if the case was before the court on a bypass or certification. *Id.* at 684-85. This case, however, is not before the court on appeal, bypass or certification but rather as an original action pursuant to a petition for removal from the Dane County Circuit Court.

Accordingly, the stay of proceedings pending in the Dane County Circuit Court is lifted; the preliminary injunction enjoining all portions of the amended MPCP is continued until further order of the Dane County Circuit Court; and the original action proceeding pending before this court is dismissed without prejudice.

ANN WALSH BRADLEY, J., did not participate.

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metz, Wilcox and Geske believe that while the legislature has chosen to expand the program in the amendments challenged here, the program is still limited and experimental and, under the stipulated facts, remains inoffensive to the dictates of the United States Constitution, the Wisconsin Constitution and the Wisconsin Public Purpose Doctrine.

APPENDIX E

WEST'S WISCONSIN STATUTES ANNOTATED
SCHOOLS
CHAPTER 119. FIRST CLASS CITY SCHOOL SYSTEM

Current through 1995 Act 135, published 1/5/96

119.23. Milwaukee parental choice program

(1) In this section, "membership" has the meaning given in s. 121.004(5).

(2)(a) Subject to par. (b), beginning in the 1990-91 school year, any pupil in grades kindergarten to 12 who resides within the city may attend, at no charge, any private school located in the city if all of the following apply:

1. The pupil is a member of a family that has a total family income that does not exceed an amount equal to 1.75 times the poverty level determined in accordance with criteria established by the director of the federal office of management and budget.

2. In the previous school year the pupil was enrolled in the school district operating under this chapter, was attending a private school under this section, was enrolled in grades kindergarten to 3 in a private school located in the city other than under this section or was not enrolled in school.

3. The private school notified the department of its intent to participate in the program under this section by May 1 of the previous school year. The notice shall specify the number of pupils participating in the program under this section for which the school has space.

4. The private school complies with 42 USC 2000d.

5. The private school meets all health and safety laws or codes that apply to public schools.

(b) In the 1995-96 school year, no more than 7% of the school district's membership may attend private schools under this section. Beginning in the 1996-97 school year, no more than 15% of the school district's membership may attend private schools under this section.

(3)(a) The pupil or the pupil's parent or guardian shall submit an application, on a form provided by the department, to the participating private school that the pupil wishes to attend. Within 60 days after receiving the application, the private school shall notify the applicant, in writing, whether the application has been accepted. The department shall ensure that the private school determines which pupils to accept on a random basis, except that the private school may give preference in accepting applications to siblings of pupils accepted on a random basis.

(b) If the private school rejects an applicant because it has too few available spaces, the pupil may transfer his or her application to a participating private school that has space available.

(4) Upon receipt from the pupil's parent or guardian of proof of the pupil's enrollment in the private school, the department shall pay to the parent or guardian, from the appropriaton under s. 20.255(2)(fu), an amount equal to the total amount to which the school district is entitled under s. 121.08 divided by the school district membership, or an amount equal to the private school's operating and debt service cost per pupil that is related to educational programming, as determined by the department, whichever is less. The department shall pay 25% of the total amount in September, 25% in November, 25% in February and 25% in May. The department shall send the check to the private school. The parent or guardian shall restrictively endorse the check for the use of the private school.

(5) The department shall:

(a) Annually reduce the aid paid to the board under s. 121.08 by an amount determined as follows:

1. Divide the total amount to which the school district is entitled under s. 121.08 by the school district membership.

2. Multiply the quotient under subd. 1 by the number of pupils attending private schools under this section.

(b) Ensure that aid paid to other school districts under s. 121.98 is neither reduced nor increased as a result of the payments under sub. (4) or the reduction in aid to the board under par. (a) and that the amount of the aid reduction under par. (a) lapses to the general fund.

(c) Ensure that pupils and parents and guardians of pupils who reside in the city are informed annually of the private schools participating in the program under this section.

(d) Repealed by 1995 Act 27, § 4007m, eff. July 29, 1995.

(6) The board shall provide transportation to pupils attending a private school under this section if required under s. 121.54 and may claim transportation aid under s. 121.58 for pupils so transported.

(7)(a) Each private school participating in the program under this section shall meet at least one of the following standards:

1. At least 70% of the pupils in the program advance one grade level each year.

2. The private school's average attendance rate for the pupils in the program is at least 90%.

3. At least 80% of the pupils in the program demonstrate significant academic progress.

4. At least 70% of the families of pupils in the program meet parent involvement criteria established by the private school.

(am) Each private school participating in the program under this section is subject to uniform financial accounting standards established by the department and annually shall submit to the department an independent financial audit of the private school.

(b) The department shall monitor the performance of the pupils attending private schools under this section. If the department determines in any school year that the private school is not meeting at least one of the standards under par. (a), that private school may not participate in the program under this section in the following school year.

(c) A private school may not require a pupil attending the private school under this section to participate in any religious activity if the pupil's parent or guardian submits to the pupil's teacher or the private school's principal a written request that the pupil be exempt from such activities.

(8) There is created a pupil assignment council composed of one representative from each private school participating in the program under this section. Annually by June 30, the council shall make recommendations to the participating private schools to achieve, to the extent possible, a balanced representation of pupils participating in the program under this section.

(9) The legislative audit bureau shall perform a financial and performance evaluation audit on the program under this section. The bureau shall submit copies of the audit report to the chief clerk of each house of the legislature for distributon to the appropriate standing committees under s. 13.172(3) by January 15, 2000.

No. 98-376

Supreme Court, U.S.
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SEP 21 1998
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In The

Supreme Court of the United States

October Term, 1997

WARNER JACKSON, *et al.*,

v. *Petitioners,*

JOHN T. BENSON, *et al.*,

Respondents.

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, *et al.*,

v. *Petitioners,*

JOHN T. BENSON, *et al.*,

Respondents.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

v. *Petitioners,*

JOHN T. BENSON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wisconsin

STATEMENT OF RESPONDENTS PARENTS FOR SCHOOL CHOICE, *ET AL.*, IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF ISSUE PRESENTED

Does the expanded Milwaukee Parental Choice Program, Wis. Stat. § 119.23, which places state funds at the disposal of low-income parents to choose schools for their children, and adds private religiously affiliated schools to a preexisting array of public and private nonsectarian educational choices, violate the Establishment Clause of the First Amendment?

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Brown v. Board of Education, 347 U.S. 483 (1954) 6, 7

Campbell v. Manchester Board of Sch. Directors, 641 A.2d 352 (Vt. 1994).....20, 21, 24, 25, 26

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Gatton v. Goff, slip op., No. 96-CVH-01-193 (Ohio Ct. Common Pleas July 31, 1996) 22

Kotterman v. Killian, No. CV-97-0412 SA (Ariz. filed Sept. 29, 1997) 25

Lemon v. Kurtzman, 403 U.S. 602 (1971)..... 17

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Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) 17, 19, 21

Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583 (Ohio Ct. App. May 1, 1997) 22, 23

Strout v. Maine Dep't of Educ., slip op., No. 97-259-B-H (D. Me. Aug. 13, 1998)..... 24

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Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481 (1986) 14, 17, 19, 21, 25

Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) 17, 19, 25

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Me. Rev. Stat. Ann. tit. 20, § 2951(2) 24

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Commonwealth of Pennsylvania Legislative Journal, June 16, 1995, 179th Session 11

John E. Chubb and Terry M. Moe, *Politics, Markets & America's Schools* (1990) 8

Lois Fecteau, "Vouchers for Schools Deep-Sixed," *Albuquerque Journal* (Feb. 5, 1998) 12

Jan Ferris, "Voucher Plan Leaves a Trail of Confusion," *Sacramento Bee* (Jan. 11, 1996) 11

Rep. William D. Ford, "Vouchers for Any Elementary School? Don't Send Taxes to Religious Schools," *St. Louis Post-Dispatch* (Aug. 31, 1992) 12

TABLE OF AUTHORITIES – Continued

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Howard L. Fuller and Sammis B. White, *Expanded School Choice in Milwaukee* (1995) 7

Jay P. Greene, Paul E. Peterson, and Jiangtao Du, *The Effectiveness of School Choice in Milwaukee: A Secondary Analysis of Data from the Program's Evaluation* (1996) 3, 9

Rob Hotakainen, "Legislative Preview; School Vouchers," *Star Tribune (Minneapolis)* (Jan. 14, 1996) 12

Jon Jeter, "As Test of Vouchers, Milwaukee Parochial School Exceeds Expectations," *Washington Post* (Aug. 31, 1998) 5

Larry Kaplow, "Panel Wary of Private School Plan," *Palm Beach Post* (Feb. 8, 1995) 12

Dennis Kelly, "Kids' Scores for Reading 'In Trouble'," *USA Today* (Apr. 28-30, 1995) 7

Jenny Labalme & Larry MacIntrye, "Senate Passes Remediation Measure," *Indianapolis Star* (Mar. 7, 1995) 12

Jon Matthews, "School Voucher, Welfare-Limits Bills Rejected," *Sacramento Bee* (July 4, 1996) 11

Milwaukee Public Schools Directions (1995) 18

Derek Neal, "The Effects of Catholic Secondary Schooling on Educational Achievement," 15 *J. Labor Econ.* 98 (1997) 9

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Paul E. Peterson and Byran C. Hassel, eds., *Learning From School Choice* (1998) 9

Johnna Pro, "Choice Proposal Faces Debate," *Pittsburgh Post-Gazette* (May 11, 1995) 12

Ray Serati, "School Vouchers Getting Another Vote in the House," *State Journal-Register* (Apr. 24, 1995) 12

Scott Stephens, "School Vouchers Unconstitutional, ACLU Contends," *The Plain Dealer (Cleveland)* (Mar. 30, 1995) 12

Jim Sullinger, "School Vouchers Rejected," *Kansas City Star* (Mar. 1, 1995) 12

Stephan Thernstrom and Abigail Thernstrom, *America In Black and White: One Nation, Indivisible* (1997) 8

"Under the Dome," *Denver Post* (Apr. 16, 1996) 12

"U.S. Students Make Progress in Math," *Dallas Morning News* (Feb. 28, 1997) 8

David Vise, "District School Voucher Bill Gets Congressional Approval," *Washington Post* (May 1, 1998) 11

INTRODUCTORY STATEMENT

Respondents Parents for School Choice, Pilar Gonzalez, Dinah Cooley, Julie Vogel, Kate Helsper, Blong Yang, Gail Crockett, Yolanda Lassiter, and Jeanine Knox join petitioners in urging the Court to resolve the question presented. After years of waiting, these parents and thousands of others with limited economic means in Milwaukee now have the opportunity to direct their children's state education funds to the schools of their choice. But so long as claims of unconstitutionality shroud parental choice programs, those parents cannot be secure about their children's future.

The crisis in urban public education is perhaps the gravest challenge facing Americans today, and parental choice constitutes one of the most vibrant and promising responses. Constitutional arguments are raised against parental choice in both the judicial and legislative arenas. Attempting to apply this Court's Establishment Clause jurisprudence, different courts have reached conflicting conclusions as to the constitutionality of parental choice. Given the resulting legal uncertainty, conscientious legislators need guidance from this Court. This case presents a well-developed factual record and a functioning parental choice program that is a model for education reform efforts around the nation, and thus provides an ideal opportunity to resolve the constitutional issue in the most broadly applicable context. The decision on review provides a thorough and well-reasoned analysis of the constitutional issue, and carefully and correctly applies this Court's Establishment Clause jurisprudence. Yet other courts, interpreting the same precedents, have reached contradictory results. Respondents therefore respectfully

urge this Court to take the case and to affirm the judgment of the Wisconsin Supreme Court.

STATEMENT OF THE CASE

Respondents add the following to petitioners' Statement of the Case.

Respondents are defendants-intervenors consisting of Parents for School Choice, a community organization that advocated expansion of the Milwaukee Parental Choice Program, and eight parents acting on behalf of their children, who are among the intended beneficiaries of the expanded parental choice program.

The Milwaukee Parental Choice Program arises in the context of the state's largest urban public school system, a system mired in chaos and dismal performance. As the Wisconsin Supreme Court observed in *Davis v. Grover*, 480 N.W.2d 460, 469 (Wis. 1992), "the Milwaukee Public School District has significantly greater education and poverty problems than any other school district in the state." Among the legislature's responses were the "Chapter 220" interdistrict public school transfer program, magnet schools, charter schools, and out-placement of "at-risk" children in private schools. During the 1990s, the state also significantly increased its financial commitment to the Milwaukee Public Schools, both in absolute dollars and as a relative share of the district's budget. See Affidavit of Milwaukee School Board Member John Gardner (Jt. App. 246).[1]

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[1] Jt. App. refers to the Joint Appendix prepared for use before the Wisconsin Supreme Court.

In 1989, the legislature enacted the Milwaukee Parental Choice Program, Wis. Stat. § 119.23, allowing up to 1,000 economically disadvantaged youngsters[2] to use their portion of state public school funds at participating nonsectarian private schools which would agree to admit the students on a random selection basis and to accept the state's funding as full payment of tuition. The state's payment is capped at the school's tuition or actual per-pupil operating costs, whichever is greater. Checks are made payable to the parents, who sign them over to the schools of their choice.[3]

For the first several years, data from the program were restricted to a single researcher chosen by the Wisconsin Department of Public Instruction.[4] After the information was made more widely available in 1995, a team of researchers led by Dr. Paul Peterson of Harvard University's John F. Kennedy School of Government found substantial academic gains for youngsters in their third and fourth years in the choice program. See Jay P. Greene, Paul E. Peterson, and Jiangtao Du, *The Effectiveness of*

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[2] The actual eligibility was set at one percent of the students in the Milwaukee Public Schools. That number subsequently was increased to 1.5 percent.

[3] For this reason, petitioners' assertion that the amended program will "divert" public funds to private schools (see, e.g., Pet. 10) is inaccurate. The program diverts not money, but the power to choose. As the Wisconsin Supreme Court found, "[N]ot one cent flows from the State to a sectarian private school under the amended MPCP except as a result of the necessary and intervening choices of individual parents." Pet. App. 28a.

[4] The Wisconsin Department of Public Instruction, headed by the Superintendent, an elected official, has been quite hostile to the Milwaukee Parental Choice Program.

School Choice in Milwaukee: A Secondary Analysis of Data from the Program's Evaluation (1996), cited in *Jackson v. Benson*, Pet. App. 44a n.26. Meanwhile, reform advocates including former Milwaukee Public Schools (MPS) Superintendent Dr. Howard L. Fuller urged an expansion of the Milwaukee Parental Choice Program, both because demand for the program exceeded supply and to exert pressure on MPS to reform. See Testimony of Dr. Howard L. Fuller (Jt. App. 339-40).

In 1995, the legislature expanded the program in two principal ways: (1) it successively increased the number of eligible students to seven percent of MPS students and then to 15 percent; and (2) it lifted the exclusion of religiously affiliated schools from the program. The statute required participating religious schools to allow students to opt out of religious activities. The expanded program was challenged in the present lawsuit, and the expansion was enjoined in August 1995 by the Wisconsin Supreme Court. It was not until that court ruled in June 1998 in the decision now on review that the injunction was finally lifted in its entirety and the program was allowed to expand.

REASONS FOR GRANTING THE WRIT

I. THE FAMILIES IN THE MILWAUKEE PARENTAL CHOICE PROGRAM NEED TO HAVE THE CONSTITUTIONAL CLOUD REMOVED.

The journey for several thousand economically disadvantaged families now participating in the Milwaukee Parental Choice Program has been a tumultuous one. By

the time of the Wisconsin Supreme Court's preliminary injunction in August 1995, more than 4,000 children had applied for the expanded program, and over 3,400 had been admitted to participating private schools. Pet. App. 8a n.3. The injunction had the effect of rolling back enrollment in the program to approximately 1,600 students and excluding religious schools from the range of options, thereby throwing both families and schools into disarray. See, e.g., Testimony of Pilar Gonzalez (Jt. App. 396-97); Testimony of Valerie Johnson (Jt. App. 406-08). Following remand from the Wisconsin Supreme Court, the trial court provided partial interim relief, lifting the injunction with respect to the number of eligible children, but then reinstated the rollback following an adverse final decision. Pet. App. 9a.

Now that the Wisconsin Supreme Court has upheld the program in its entirety, approximately 15,000 children from low-income families are eligible for the expanded educational opportunities the program provides. According to press accounts, approximately 6,000 children and more than 80 private schools are participating in the program in the 1998-99 school year.[5] Twice so far during the pendency of this litigation, many of the economically disadvantaged families in this program have looked forward to new educational opportunities for their children only to have them snatched away. Those families cannot be secure until this Court has affirmed the constitutionality of parental choice. Moreover, the current cloud

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[5] See Jon Jeter, "As Test of Vouchers, Milwaukee Parochial School Exceeds Expectations," *Washington Post* (Aug. 31, 1998) at A3.

of constitutional uncertainty limits the full potential of the Milwaukee program. One premise of school choice policies is that the availability of paying students will induce new private schools to form and existing private schools to expand. This, however, requires the investment of capital that is not likely to occur if there is a substantial threat that parental choice may be held unconstitutional in the near future. The likely result is to confine families to whatever places happen to be unfilled at existing schools. This is an immediate negative consequence to our clients caused by the legal uncertainty that only this Court can resolve.

As a consequence, respondent parents take the unusual step of supporting the writ, for the purpose of securing for their children and others similarly situated – not only in Wisconsin but throughout America – desperately needed educational opportunities.

II. BECAUSE PARENTAL CHOICE PLAYS A CENTRAL ROLE IN EDUCATION REFORM, ITS CONSTITUTIONALITY SHOULD BE RESOLVED AS QUICKLY AND DEFINITIVELY AS POSSIBLE.

A. Parental choice is a central component of efforts around the nation to deliver high-quality educational opportunities to disadvantaged and minority schoolchildren.

"[E]ducation is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). The program at issue in this case represents a major facet of the State of Wisconsin's sweeping efforts to deliver on the promise made in *Brown:* that education, "where the state has undertaken to

provide it, is a right which must be made available to all on equal terms." *Id.*; see also *Davis v. Grover*, 480 N.W.2d at 547 (Ceci, J., concurring) ("The Wisconsin legislature . . . has attempted to throw a life preserver to those Milwaukee children caught in the cruel riptide of a school system floundering upon the shoals of poverty, status-quo thinking, and despair.").

It is difficult to overstate the crisis in urban education. In the Milwaukee Public Schools, only 48 percent of the students graduate, and the annual dropout rate is more than seven times the statewide average. See Howard L. Fuller and Sammis B. White, *Expanded School Choice in Milwaukee* (1995) at 16 (Jt. App. 165). The system's failure is most pronounced among minority and low-income children. In 11 MPS high schools that enroll more than three-fourths of the city's black students, the median grade-point average is less than 1.5 on a four-point scale, and the failure rate in core academic courses ranges from 26 to 43 percent. *Id.* at 4 (Jt. App. 153).

This crisis reflects nationally in poor achievement among minority students, who are disproportionately consigned to failing large urban school districts. The National Assessment of Educational Progress (NAEP) reported in 1995 that only 12 percent of black seniors (compared to 40 percent of whites) were proficient in reading.[6] The 1997 NAEP also found that while 76 percent of white fourth-graders were proficient in basic mathematics skills, only 41 percent of Hispanic and 32

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[6] See Dennis Kelly, "Kids' Scores for Reading 'In Trouble'," *USA Today* (Apr. 28-30, 1995) at 1A.

percent of black students demonstrated basic proficiency.[7] The typical black high school senior scores four academic years behind the typical white senior – a gap that has widened substantially over the past decade. See Stephan Thernstrom and Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* (1997) at 355. Despite the massive investment of public and private resources, little progress has been made toward delivering high-quality educational opportunities to poor inner-city children, a fact that likely is attributable in large part to the highly bureaucratic nature of large urban public school systems. See, e.g., John E. Chubb and Terry M. Moe, *Politics, Markets & America's Schools* (1990) at 181, cited with approval in *Davis v. Grover*, 480 N.W.2d at 472.

Against this discouraging backdrop, parental choice offers real promise. As a model for education reform, parental choice encompasses two essential elements: (1) it transfers control over state education funding from state officials to parents; and (2) it creates competition among schools for low-income students and the dollars they command. The Milwaukee Parental Choice Program exemplifies this reform model. The program serves an exclusively low-income and overwhelmingly minority student population. See Fuller and White at 22 (Jt. App. 170). Though expert assessments of academic performance differ, in 1996 the Kennedy School team for the first time compared test scores of students in the Milwaukee Parental Choice Program who were admitted to private schools through random selection with students

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[7] See "U.S. Students Make Progress in Math," *Dallas Morning News* (Feb. 28, 1997) at 6A.

who were not selected for the program. They found substantial academic gains after the students' third and fourth years in the program, reducing substantially the chronic achievement gap between minority and non-minority students.[8] See Greene, *et al.*, *supra*. Those results mirror similar positive outcomes in publicly and privately funded parental choice programs elsewhere in the country. See Paul E. Peterson and Bryan C. Hassel, eds., *Learning from School Choice* (1998). Likewise, the record in this case establishes that the choice program has stimulated positive reform efforts within the Milwaukee Public Schools. See Testimony of petitioners' expert, MPS Superintendent Robert Jasna (Jt. App. 414-32); Testimony of respondents' expert, former MPS Superintendent Dr. Howard L. Fuller (Jt. App. 339-49); Affidavit of Milwaukee School Board Member John Gardner (Jt. App. 241).

The foregoing discussion is not intended to extol the benefits of parental choice. The record in that regard speaks for itself, and the policy efficacy of parental choice is not before this Court. Rather, it is clear that parental choice is an increasingly important method of expanding educational opportunities for children who desperately

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[8] These statistics eminate from the program prior to its expansion to include religious schools. We expect similar, if not more dramatic, post-expansion results. The wider range of educational opportunities will allow for more competition and greater innovation. Further, studies indicate that religious schools produce substantial academic gains among urban minority students. Derek Neal, "The Effects of Catholic Secondary Schooling on Educational Achievement," 15 *J. Labor Econ.* 98 (1997).

need them. For that compelling reason, the need for a dispositive ruling on the constitutional issue is urgent.

B. The Court should not wait to resolve the constitutional issue because it is frequently raised in legislative debates over parental choice, necessitating clear guidance from this Court.

The debate over parental choice is unusual because arguments over constitutionality often are raised in the legislative context. Not only courts but legislators need guidance on the constitutional issues so that states are not impeded in fully exercising the educational authority reserved to them by the Tenth Amendment. A vibrant model for urgently needed education reform should not be held hostage to jurisprudential uncertainty.

Despite the potential that parental choice holds for enhancing the quality of education received by economically disadvantaged children across the nation, the constitutional cloud over parental choice programs serves as a formidable barrier to progress. As petitioners note, school choice legislation has been considered in at least 21 state legislatures and the United States Congress. Pet. 20. But whenever such proposals are discussed, legislators inevitably debate their constitutionality.

Thus, for example, in the Commonwealth of Pennsylvania, a constitutional point of order killed a school choice plan in 1991.[9] No further consideration of the bill's merits was allowed in the House of Representatives

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[9] *Commonwealth of Pennsylvania Legislative Journal*, Dec. 11, 1991, 175th Session, pg. 1928.

because a majority thought the proposal was unconstitutional. In 1995 – in a striking illustration of the uncertainty surrounding the question presented here – the same constitutional point of order was raised, but the House reversed itself and voted to sustain the constitutionality of the school choice proposal.[10]

While other states do not have a formal mechanism similar to Pennsylvania's for debating constitutional issues related to legislative proposals, the doubts expressed about the constitutionality of choice plans are one element of the school choice debate that remains constant across the nation. To give just a few examples, in the United States House of Representatives, Delegate Eleanor Holmes Norton objected to a scholarship program for District of Columbia students by arguing that the bill was unconstitutional, citing the court of appeals decision in this case (Pet. App. 59a) that subsequently was overturned by the Wisconsin Supreme Court.[11] In California, the State Superintendent of Public Schools and many State Senators opposed a voucher plan introduced by Governor Pete Wilson and passed by the State Assembly by asserting that it was unconstitutional.[12] In Colorado, a pilot program for school vouchers was killed in the State House of Representatives when its opponents argued that

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[10] *Commonwealth of Pennsylvania Legislative Journal*, June 16, 1995, 179th Session, pg. 1464.

[11] See David Vise, "District School Voucher Bill Gets Congressional Approval," *Washington Post* (May 1, 1998) at C1.

[12] See Jon Matthews, "School Voucher, Welfare-Limits Bills Rejected," *Sacramento Bee* (July 4, 1996) at A3; Jan Ferris, "Voucher Plan Leaves a Trail of Confusion," *Sacramento Bee* (Jan. 11, 1996) at A10.

it was unconstitutional.[13] And in New Mexico, the chairman of the State House Education Committee refused to bring a voucher bill to the floor on constitutional grounds.[14] As one newspaper cogently observed during a school choice battle in Illinois, "Generally lawmakers don't like to vote on bills that are surrounded by constitutional questions."[15] Indeed, the legislators' oath to uphold the Constitution makes such caution prudent. On the other hand, it would be tragic to stifle desirable educational reform due to a mistaken view of constitutionality.

Other examples of constitutional concerns emerging in parental choice debates across the nation abound.[16] Given the severity of the crisis facing this nation's urban public schools, now is the time for this Court to let

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[13] See "Under the Dome," *Denver Post* (Apr. 16, 1996) at B5.

[14] See Lois Fecteau, "Vouchers for Schools Deep-Sixed," *Albuquerque Journal* (Feb. 5, 1998) at A10.

[15] Ray Serati, "School Vouchers Getting Another Vote in the House," *State Journal-Register* (Apr. 24, 1995) at 7.

[16] See, e.g., Rob Hotakainen, "Legislative Preview; School Vouchers," *Star Tribune (Minneapolis)* (Jan. 14, 1996) at 16A; Johnna Pro, "Choice Proposal Faces Debate," *Pittsburgh Post-Gazette* (May 11, 1995) at A1; Scott Stephens, "School Vouchers Unconstitutional, ACLU Contends," *The Plain Dealer (Cleveland)* (Mar. 30, 1995) at 4B; Jenny Labalme & Larry MacIntrye, "Senate Passes Remediation Measure," *Indianapolis Star* (Mar. 7, 1995) at B3; Jim Sullinger, "School Vouchers Rejected," *Kansas City Star* (Mar. 1, 1995) at C1; Larry Kaplow, "Panel Wary of Private School Plan," *Palm Beach Post* (Feb. 8, 1995) at 5B; Rep. William D. Ford, "Vouchers for Any Elementary School? Don't Send Taxes to Religious Schools," *St. Louis Post-Dispatch* (Aug. 31, 1992) at 3B.

legislators around the nation know that they may consider well-designed parental choice programs free from constitutional doubt.

III. THIS CASE PROVIDES AN IDEAL OPPORTUNITY TO RESOLVE THE CONSTITUTIONALITY OF PARENTAL CHOICE BECAUSE IT PRESENTS A PROTOTYPICAL PARENTAL CHOICE PROGRAM AND THE RECORD IS WELL-DEVELOPED.

Among the cases involving parental choice presently in litigation around the nation, this case provides the best opportunity for the Court to resolve the common constitutional question.[17] The features common to most modern parental choice programs and proposals include: (1) funds placed at the disposal of parents in the form of vouchers, scholarships, tax credits, or tax deductions; (2) private schools added to the range of public education options; and (3) aid targeted to economically disadvantaged or at-risk youngsters. Those features are embodied within the Milwaukee Parental Choice Program.[18]

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[17] Respondents' counsel also represent parties in the Ohio, Vermont, Maine, and Arizona cases discussed in section IV, *infra*. All of the cases involve federal Establishment Clause issues, but most present state constitutional issues as well. As a result, those cases cannot be relied upon to provide vehicles for this Court to address the pervasive Establishment Clause question.

[18] Those three features also are embodied within the Ohio and Arizona programs, although the Arizona program provides state income tax credits for contributions to scholarship funds rather than direct aid to students. The Vermont and Maine programs date back to the 19th century and provide tuition for

Accordingly, a decision in this case would have a broad impact on other parental choice programs and proposed legislation.

This case also presents a clearly worded statute and a program that has functioned for seven years (prior to the inclusion of religious schools). It is clear from the face of the Milwaukee Parental Choice Program that "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini v. Felton*, 117 S. Ct. 1997, 2014 (1997). The record contains evidence placing the program in the broader context of public education in Wisconsin, wherein public funding follows parental choices. See *Jackson v. Benson*, Pet. App. 26a n.16 (citing *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 492 (1986) (Powell, J., concurring) (calling for an inquiry into "the nature and consequences of the program viewed as a whole")). Both sides have presented extensive factual evidence; and alone among pending parental choice cases, an evidentiary hearing was held in this case in the trial court, focused in part on the program's "primary effect."[19] For all the foregoing reasons, this is the right

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private schools or public schools in other districts for students in towns that do not have their own public schools.

[19] At the evidentiary hearing, former MPS Superintendent Dr. Howard L. Fuller described the program's "primary effect" as follows:

> [W]e will begin to have a discussion in our community about all of our children. We will begin to have a discussion about how do we create the largest number of learning opportunities for all of these kids.

case at the right time to decide the constitutionality of parental choice.

IV. ALTHOUGH THE DECISION BELOW ACCORDS WITH THE DECISIONS OF THIS COURT, A SPLIT OF AUTHORITY OVER PARENTAL CHOICE SUGGESTS THE NEED FOR THE COURT TO SETTLE THIS IMPORTANT QUESTION.

Among the good reasons to grant the writ, an alleged departure by the Wisconsin Supreme Court from this Court's precedents is not one. To the contrary, the Wisconsin Supreme Court's analysis and application of this Court's precedents were meticulous and correct.[20] But other courts have misapplied this Court's precedents in the parental choice context, leading to contradictory

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> I think that what it will bring into play would be, in addition to the existing schools, there will be new schools out there that will come into being that will find their niche to begin to reach kids that we are not currently reaching or that we are losing. I think it will begin to give poor parents some capacity to have leverage over this entire discussion. And the reason why they will have leverage is because they will begin to have control over resources, the same type of control over resources that people with money have.

Jt. App. 348-49.

[20] By contrast, the trial court, which struck down the expanded program, was openly disdainful of this Court's precedents, declaring that "[i]t can hardly be said that this does not constitute direct aid to the sectarian schools. Although the U.S. Supreme Court has chosen to turn its head and ignore the real impact of such aid, this court refuses to accept that myth." Pet. App. 166a.

holdings on the Establishment Clause question and underscoring the need for definitive guidance from this Court.

A. The Wisconsin Supreme Court's decision correctly applies this Court's Establishment Clause jurisprudence.

Petitioners urge that the present case is virtually identical to the programs struck down by this Court in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). To the contrary, this Court in *Nyquist*, *id.* at 782 n.38, specifically reserved the question presented here: "a case involving some sort of public assistance (e.g., scholarships) made available generally without reference to the sectarian-nonsectarian, public-nonpublic nature of the institution benefited." In *Nyquist*, each facet of the challenged program directed aid to either private schools or the students who patronize them. By contrast, as the Wisconsin Supreme Court observed, the Milwaukee Parental Choice Program operates within a system "in which public funds follow each child, [which] now encompasses a wide range of school choices – mainly public, but some private or religious." Pet App. 26a n.16.

Thus, *Nyquist*'s distinction between state programs that channel aid exclusively to private (predominantly religious) schools, and programs that provide aid to both public and private institutions, is of great significance here. The Milwaukee Parental Choice Program operates within the latter context. Under the state's pupil aid formula, needy students in the Milwaukee district are

permitted to use their per capita share of the state education fund at the school of their choice – public or private. If they choose to attend a public school, their per capita allotment will go to the public school. If they choose to attend a private secular school, their per capita allotment will go to the private secular school. If they choose to attend a private religious school, their per capita allotment will go to the private religious school. The program is thus functionally identical to the example mentioned in *Nyquist*'s footnote 38, the G.I. Bill, in which the government pays a sum for education at any college (public, private secular, or private religious) that the student chooses. Unlike the program struck down in *Nyquist*, state aid here is not confined to use in private schools.

In a series of cases since *Nyquist*, this Court consistently has upheld such "government programs offering general educational assistance." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 9 (1993). The Wisconsin Supreme Court appropriately and carefully applied this Court's post-*Nyquist* precedents, specifically *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters, supra; Zobrest, supra; Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); and *Agostini, supra*. From this line of decisions, the Wisconsin Supreme Court distilled the following principle in applying the primary effect prong of the *Lemon*[21] test:

> [S]tate educational assistance programs do not have the primary effect of advancing religion if those programs provide public aid to both sectarian and nonsectarian institutions (1) on the

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[21] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

> basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age children.

Pet. App. 25a. Because the program "plac[ed] on equal footing the options of public and private school choice, and vest[ed] power in the hands of parents to choose where to direct the funds allocated for their children's benefit," Pet. App. 28a, the court concluded the amended Milwaukee Parental Choice Program fit squarely within the framework of what is permissible under this Court's Establishment Clause jurisprudence.

Petitioners allege that the program is unconstitutional because most of the options available to parents are religious schools. In fact, within the range of educational choices made available by the state's educational funding system, the vast majority of choices are public schools. See *Jackson v. Benson*, Pet. App. 26a n.16; see also *Milwaukee Public Schools Directions* (1995) (Rec. Doc. 216, Ex. H). In any event, the statistical snapshot is not a proper mooring to which petitioners may tether their case. As this Court admonished in *Agostini*, 117 S. Ct. at 2013 (citing *Mueller*, 463 U.S. at 401), "Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian schools who happen to receive the otherwise neutral aid."

For all those reasons, it is manifestly unnecessary for this Court to overturn *Nyquist* in order to affirm the Wisconsin Supreme Court's decision. It need only reaffirm and apply the principles it relied upon in *Mueller*,

Witters, *Zobrest*, *Rosenberger*, and *Agostini*.[22] Still, as this Court acknowledged in *Agostini*, 117 S. Ct. at 2010, the Court's Establishment Clause jurisprudence has changed since the era in which *Nyquist* was decided, specifically, "our understanding of the criteria used to assess whether aid to religion has an impermissible effect." At the same time, the nature of school choice has evolved from 1970s-style "parochaid" into an essential ingredient of systemic public education reform. In light of these changed circumstances, it is timely and necessary for this Court to address the constitutional question.

B. Lower courts have reached conflicting conclusions in applying this Court's precedents.

Respondents agree with petitioners' contention that this Court's "Establishment Clause jurisprudence has proved susceptible to . . . radically differing interpretations" (Pet. 19). Indeed, this Court before has acknowledged that "[i]t is not at all easy . . . to apply this Court's various decisions construing the Clause." *Mueller v. Allen*, 463 U.S. at 393.

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[22] Indeed, the Court need not go so far as *Rosenberger* or *Agostini*, which involved the arguably direct provision of funds to religious activities or services to students in religious schools. The program here provides indirect aid by placing funds at the disposal of parents. The state confers no endorsement of religion when parents choose to use neutrally available state aid at religious schools. See *Agostini*, 117 S. Ct. at 2016; see also *Zobrest*, 501 U.S. at 22-23 (Blackmun, J., dissenting) ("When government dispenses public funds for individuals who employ them to finance private choices, it is difficult to argue that government is actually endorsing religion.").

At present, no consensus among lower courts exists as to whether the Establishment Clause prevents parents from sending children eligible for choice programs to religious schools if the program is neutral on its face between sectarian and nonsectarian alternatives and the transmission of public funds is guided by the independent decisions of parents.

Consistent with the Wisconsin Supreme Court, the Vermont Supreme Court held that the First Amendment does not require the exclusion of religious schools from choice programs. *Campbell v. Manchester Board of Sch. Directors*, 641 A.2d 352 (Vt. 1994). Pursuant to Vermont law, towns that do not maintain a public high school are required to pay the tuition costs of local students to attend "an approved public or independent high school, to be selected by the parents or guardians of the pupil, within or without of the state."[23] Despite the broad language of the statute, the school board of a "tuitioning town" refused to allow the reimbursement of the plaintiffs in the case, who lived in a town that did not operate a public high school, for the tuition costs of sending their son to an out-of-state sectarian school; the board claimed by doing so it would run afoul of the Establishment Clause.

Although the Vermont Supreme Court earlier had held that the First Amendment prevented towns from reimbursing parents under the same statute for tuition paid to religious schools, see *Swart v. South Burlington Town Sch., Dist.*, 167 A.2d 514 (Vt. 1961), the court

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[23] Vt. Stat. Ann. tit. 16, § 822(a)(1).

reviewed the constitutional issues anew in light of this Court's "more recent teachings." *Campbell*, 641 A.2d at 357. Perceiving some tension between *Nyquist*, on the one hand, and *Mueller* and *Witters*,[24] on the other, the court held the case governed by the principles set forth in the two latter cases.

Two factors were critical to the court's holding. First, consistent with this Court's analysis in *Mueller*, it emphasized that "tuition reimbursement covers all students whether or not they attend a public or private school, whereas in *Nyquist* it went only to private school students." *Campbell*, 641 A.2d at 360. And second, the court concluded that this Court's evolving jurisprudence lent greater weight in *Mueller* and *Witters* than in *Nyquist* to the presence of parental choice in directing neutrally provided state assistance. Accordingly, the court, although careful to restrict the reach of its decision to the specific factual record before it, held that the Establishment Clause did not bar the plaintiffs from receiving tuition reimbursement for the cost of educating their son at a religious school.[25]

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[24] The case was decided before *Rosenberger* and *Agostini*.

[25] Respondents strongly question the relevance of petitioners' observation that the Vermont program involves "facts peculiar to small school districts" (Pet. 22 n.19). In both Vermont and Milwaukee, state funding follows a student to the public or private school of his choice; the only difference between the two is that certain towns in Vermont do not operate their own public schools. But given the argument advanced in the petition, it is difficult to understand why this distinction would be pertinent to the Establishment Clause challenge presented in this case.

Similarly, an Ohio Court of Common Pleas, examining a Cleveland scholarship program that petitioners concede is quite similar to the program at issue here (Pet. 21 n.18), held that the Establishment Clause did not prevent parents from using publicly funded scholarships to send their children to religious schools. See *Gatton v. Goff*, slip op., No. 96-CVH-01-193, (Ohio Ct. Common Pleas July 31, 1996), *overruled by Simmons-Harris v. Goff*, No. 96APE08-982, 1997 WL 217583 (Ohio Ct. App. May 1, 1997).[26] The court divided this Court's jurisprudence into two categories: impermissible programs providing direct assistance to private sectarian schools and constitutional programs channeling benefits to parents who may apply them in religious schools. The court observed that scholarships were available "without respect to the sectarian or nonsectarian nature of the schools benefited" and that the statute allowed students to use their scholarships in adjacent public school districts. *Id.* at 25. It also noted that schools only received money as a result of parental choices. For those reasons, the court concluded that parents seeking to use scholarships to send their children to religious schools need not be excluded from the choice program.

By contrast, some courts have embraced the position taken here by petitioners. The Ohio Court of Appeals

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[26] Respondents of course are aware that the opinion of the Ohio Court of Common Pleas no longer constitutes good authority as its judgment was reversed by the Ohio Court of Appeals; the case is now before the Ohio Supreme Court. It is discussed, nevertheless, to underscore how this Court's Establishment Clause precedents are open to inconsistent interpretation.

reversed the Court of Common Pleas, concluding that the Cleveland scholarship program constituted impermissible direct and substantial aid to sectarian schools.[27] *Simmons-Harris v. Goff*, No. 96APE08-982, 1997 WL 217583 (Ohio Ct. App. May 1, 1997).[28] Noting that no adjacent public school district had chosen to accept scholarship students, the court concluded that the program was not neutral. Because most of the private schools in Cleveland are sectarian, the court characterized the statute as skewing parental choices toward religious schools. Contending that the law framed parents' choices in such a way as to steer aid to sectarian schools, the court held that the program gave such schools a "direct government subsidy."[29] The subsidy, moreover, was substantial because a "significant portion" of the publicly funded scholarships would end up flowing to sectarian schools.

A Maine Superior Court likewise concluded that the Establishment Clause prevented parents participating in a choice program from sending their son to a religious school. *Bagley v. Maine Dep't of Educ.*, slip op., No.

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[27] The court also struck down the program on unrelated state constitutional grounds.

[28] The Ohio Supreme Court stayed the Court of Appeals' decision, thereby allowing the scholarship program, now in its third year, to continue.

[29] It is rather misleading to characterize the Ohio program, or indeed the Milwaukee Parental Choice Program, as "subsidizing" religious schools. In Ohio, for example, scholarships do not even cover the full cost of tuition at participating schools. And in Milwaukee, private schools can receive no more than their per-pupil costs. Private schools most emphatically do not receive a financial windfall from choice programs.

CV-97-484 (Me. Superior Ct. Apr. 20, 1998). The State of Maine operates a choice program similar to Vermont's; Maine, however, statutorily excludes any sectarian school.[30] Responding to the claim that such a restriction violated the Free Exercise Clause, the Maine Department of Education defended its constitutionality by maintaining that the exclusion of tuition payments for religious schools was mandated by the Establishment Clause. In a cursory analysis, the court, citing *Nyquist*, agreed, holding that the effect of such tuition payments would be to "subsidize and advance religion."[31] *Id.* at 3.

Remarkably, a Vermont Superior Court has openly placed itself "at odds" with the decision of its own supreme court. *Chittenden Town Sch. Dist. v. Vermont Dep't of Educ.*, slip op., No. S0478-96 RcC (Vt. Superior Ct., Rutland Cty., June 27, 1997), at 45. The case raised the issue of prepayment of tuition, as opposed to reimbursement, which was at issue in *Campbell*. The State Board of Education refused to allow parents to direct state tuition aid to send their children to a religious school even though they lived in a town that operated no public high school and the statutory scheme allowed such payments. Accepting the Board's argument that such payments

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[30] Me. Rev. Stat. Ann. tit. 20, § 2951(2).

[31] A federal district court recently addressed a similar challenge to the Maine statute. While it rejected the free exercise argument, the court specifically avoided the question of whether Maine constitutionally could include sectarian schools in its choice program, citing this Court's recent jurisprudence for the proposition that First Amendment restrictions are not as strict as they once were. *Strout v. Maine Dep't of Educ.*, slip op., No. 97-259-B-H (D. Me. Aug. 13, 1998).

would violate the Establishment Clause, the court held that the case was controlled by *Nyquist*'s prohibition of "direct and substantial aid." Interpreting this Court's line of Establishment Clause cases in a different manner than the Wisconsin Supreme Court (and indeed, its own supreme court), the Vermont Superior Court stated:

> *Mueller, Witters,* and *Zobrest,* do not overrule the general principle in *Nyquist* and *Agostini* that the State may not grant aid to a religious school, whether cash or in kind, whether provided to parents or students, where the effect of the aid is to subsidize the religious mission of the school or finance religious indoctrination.

Chittenden at 34. Exemplifying the lack of clarity in this area, the court questioned its own supreme court's reasoning in *Campbell,* labeling it "a departure from the core principles of the Establishment Clause." *Id.* at 46. Although it could identify no relevant factual distinction between the facts before it and those of *Campbell,* the court chose to limit the applicability of *Campbell* to its facts and to hold that the Establishment Clause justified the Board's refusal to prepay tuition for parents who choose to send their children to a religious school.

As these cases illustrate,[32] state courts are divided on the question of whether public funds that reach religious schools through facially neutral parental choice programs constitute direct and substantial aid, forbidden by this

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[32] A case challenging an Arizona income tax credit for contributions to K-12 scholarship funds is pending on original action jurisdiction before the Arizona Supreme Court. *Kotterman v. Killian,* No. CV-97-0412-SA (Ariz. filed Sept. 29, 1997).

Court in *Nyquist*, or indirect and incidental aid not foreclosed by footnote 38 of *Nyquist* and allowed by this Court in a line of cases spanning the last 15 years.[33] Respondents respectfully suggest that widespread confusion concerning the correct answer to this important question makes it appropriate for this Court to grant the petition in order to give direction to the numerous courts around the nation that are considering and will be considering challenges to parental choice programs.

CONCLUSION

This case has ramifications far beyond its formal contours, for the entire nation has a direct stake in securing the broadest possible range of educational opportunities for our nation's children. Most directly at stake, however, is the interest of the respondent families in preserving the precious opportunities secured through the Milwaukee Parental Choice Program. Respondents

[33] Respondents believe that the state supreme court cases cited in footnote 12 of the petition are not relevant to the task of developing coherent principles from this Court's decisions in *Nyquist* and post-*Nyquist* cases. Two of the four decisions were issued before *Nyquist*, and all four preceded *Mueller*. The reasoning in many of these cases, moreover, is inconsistent with this Court's recent jurisprudence and would bring into question such presumptively constitutional programs as Pell Grants and the G.I. Bill. Although the Vermont Supreme Court issued a ruling in *Swart* similar to those cited by petitioners in footnote 12, respondents think it noteworthy that the Vermont Supreme Court reached a different conclusion in *Campbell* when analyzing the issue in light of this Court's more recent decisions.

respectfully urge this Court to grant the petition and to reaffirm and apply its Establishment Clause holdings in the context of parental choice.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

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v.

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MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, *et al.*,
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v.

JOHN T. BENSON, *et al.*,
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NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
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JOHN T. BENSON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners Warner Jackson *et al.* submit this Supplemental Brief to call to the Court's attention an Order of the Wisconsin Supreme Court issued in this matter on the

day after the Petition for Certiorari was filed, to explain why they believe this Court's jurisdiction to grant the August 31 Petition for Certiorari to be unaffected by that Order, and to ask this Court, should it deem such action appropriate in order to avoid a potential jurisdictional issue, to treat the Petition for Certiorari as if filed on the date of entry of the Wisconsin court's Order, rather than the day before.

BACKGROUND

The Petition for Certiorari asks this Court to review the judgment of the Supreme Court of Wisconsin, entered on June 10, 1998, which upheld the constitutionality of the Amended Milwaukee Parental Choice Program ("Amended MPCP").

Sixteen days after judgment was entered, on June 26, one of the prevailing parties, intervening defendants Parents for School Choice *et al.* ("PSC"), filed a document styled "Motion for Clarification" (attached hereto as Appendix A), in which PSC asked the court to clarify that its June 10 judgment allowed certain schoolchildren to participate in the Amended MPCP. PSC stated its belief that the eligibility of the children in question had already been established by the June 10 judgment, but requested the "clarification" because the state Department of Public Instruction had taken a different position. The issue on which clarification was sought is a purely state-law matter, related to a question briefly discussed by the Wisconsin court at the end of its opinion, *see* Appendix to Petition for Certiorari 56a-57a. It has no bearing on the federal constitutional question that is presented in this Court.

Concerned that an amendment by the Wisconsin court of its June 10 judgment in response to the Motion for Clarification might conceivably create a question about the finality of the June 10 judgment, petitioners delayed filing their Petition for Certiorari in the hope that the Wisconsin Supreme Court would dispose of the motion

before the time to petition for certiorari expired on September 8, thus permitting the filing of a Petition unclouded by any even arguable jurisdictional question. When by late August the Wisconsin court still had not acted, petitioners prepared to file an application for extension of time for their Petition for Certiorari, based on the pendency before the Wisconsin court of the Motion for Clarification.

The filing of such an application was not necessary, however. The beginning of the new school year in Milwaukee rendered the issue raised by the Motion for Clarification largely moot. Accordingly, on August 27 PSC withdrew its motion by filing a document styled "Withdrawal of Motion for Clarification," which is attached hereto as Appendix B.

On the same day, counsel for petitioners verified with the office of the Clerk of the Wisconsin Supreme Court that the "Withdrawal of Motion for Clarification" had indeed been filed. Counsel was further assured by the deputy clerk that the court would not issue any order pertaining to the withdrawal of the motion, but rather would simply return the record to the trial court. *See* Affidavit of Jeffrey J. Kassel (attached as Appendix E), ¶ 4. Petitioners therefore filed their Petition for Certiorari on Monday, August 31. The Petition was docketed the same day.

The next day, September 1, the Wisconsin Supreme Court issued an Order, attached hereto as Appendix C, in which it "granted" what it characterized as a "Motion to Withdraw the Motion for Clarification." More important for present purposes, in the course of its Order the court stated that it had "construed" that motion "as a Motion for Reconsideration to Clarify the Opinion." App. SA-11.

Motions for reconsideration under Wisconsin Supreme Court practice are governed by Wis. Stat. § 809.64, which provides that "[a] party may seek reconsideration of the judgment or opinion of the supreme court by filing a

motion under § 809.14 for reconsideration within 20 days of the filing of the decision of the supreme court." While PSC's Motion for Clarification had been filed within the 20-day window for motions for reconsideration, it was not styled as a Motion for Reconsideration, and it neither relied upon nor made any reference to § 809.64.[1]

On September 3, the Wisconsin Supreme Court issued its Remittitur (attached hereto as Appendix D), in which it returned the record to the trial court. The Remittitur cited only the court's "opinion filed on June 10, 1998," and made no reference to any subsequent proceedings.

ARGUMENT

While petitioners believe it is their obligation to bring these developments to the attention of this Court, they submit that this Court's jurisdiction to review the judgment of June 10 pursuant to the August 31 Petition for Certiorari is unaffected by the Wisconsin Supreme Court's Order of September 1, notwithstanding its characterization of the Motion for Clarification as a "Motion for Reconsideration."

1. The problem, to the extent there is one, arises from this Court's longstanding practice of treating "[a] timely petition for rehearing . . . [as] operat[ing] to suspend the finality of the . . . [lower] court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." *Missouri v. Jenkins*, 495 U.S. 33, 46 (1990) (quoting *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942)). Thus, "while the petition for rehearing is pending, there is no 'judgment' to be reviewed." *Id.* Under the most extreme view of things, PSC's Motion for Clarification—which the Wisconsin Supreme Court on September 1 announced it had "con-

[1] PSC's Motion for Clarification cited only Wis. Stat. § 809.14, which is the generic rule governing motions practice in the Wisconsin appellate courts.

strued" as a Motion for Reconsideration (the Wisconsin equivalent of a motion for rehearing under federal practice)—was still "pending" (notwithstanding its "withdrawal" by its proponent on August 27) until the Wisconsin court on September 1 "granted" what it described as a motion to withdraw it, and thus there was "no 'judgment' to be reviewed" when the Petition for Certiorari was filed on August 31. That view of the impact of the September 1 Order on this Court's jurisdiction cannot be correct.

It is, of course, understandable that this Court will decline to entertain a petition for certiorari during the pendency of a motion for rehearing, *see, e.g., Craig v. United States,* 298 U.S. 637 (1936) (mem.) (dismissing petition as "premature," without prejudice to its renewal upon disposition of the motion for rehearing), and it is equally apparent why, as this Court's Rule 13(3) provides, the time to petition for certiorari is treated as running from the disposition of a timely motion for rehearing. But it does not follow that where, as here, this Court has before it a petition to review a judgment that is unquestionably final—and which, indeed, appeared to be final on the basis of everything in the record at the time the Petition for Certiorari was filed—its jurisdiction to review that judgment is negated by an order of the lower court issued *after* the filing of the Petition for Certiorari, which in fact *confirmed* the finality of the judgment sought to be reviewed.

In the first place, this Court's cases discussing the suspensive effect of a rehearing petition on the finality of the lower court judgment uniformly address the question of whether the time period for the filing of a petition for certiorari should be *extended.* Those cases need not be read as holding that the filing of a petition for rehearing necessarily and invariably deprives this Court of jurisdiction to entertain a petition for certiorari that was filed "prematurely" during the pendency of a rehearing petition. That is a question these cases do not address, and at least

under the circumstances presented here there is no reason this Court cannot review the June 10 final judgment of the Wisconsin Supreme Court, as the Petition for Certiorari asks it to do.

Here, in the first place—unlike the situation this Court faced in *Craig, supra*—there is no petition for rehearing pending at the time the petition for certiorari comes before this Court for decision.[2] Even accepting as determinative the Wisconsin court's characterization of PSC's Motion for Clarification as a "Motion for Reconsideration," that motion has been disposed of, without change in the original judgment, since at least September 1, the day after the Petition for Certiorari was filed. The June 10 final judgment the Petition for Certiorari asks this Court to review is still, without any question, the final judgment of the Wisconsin Supreme Court.

Equally important, the Petition for Certiorari clearly was timely when it was filed on August 31—at least as far as could have been ascertained from the record as it existed on that date. It was only the next day that the Wisconsin Supreme Court announced that it had "construed" PSC's Motion for Clarification as a Motion for Reconsideration.

The pendency of the Motion for Clarification—even assuming it was indeed still pending on August 31, notwithstanding its withdrawal four days previously—in no way called into question the finality of the June 10 judgment. While a timely petition for rehearing suspends the finality of the lower court's judgment during the time it is pending, regardless of its ultimate disposition, the same is not true where a motion merely seeks "clarification" of the judgment without asking the court "to 'reconsider [a] question decided in the case' in order to effect an 'alter-

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[2] In *Craig*, this Court acted on the petition for certiorari on March 31, 1936. The Ninth Circuit did not rule on the pending petition for rehearing until April 20 of the same year. *See* 83 F.2d 450 (9th Cir. 1936).

ation of the rights adjudicated.'" *United States v. Dieter*, 429 U.S. 6, 9 (1976) (quoting *Pink*, 317 U.S. at 266).

Here, PSC merely asked the Wisconsin Supreme Court to clarify what it believed the court's June 10 opinion already had held. *See* App. SA-5. Under such circumstances, the finality of the original judgment, for purposes of the timing of a petition for certiorari, will be affected only if the lower court makes substantive changes in that judgment. *Compare* Robert L. Stern, Eugene Gressman, *et al.*, *Supreme Court Practice* § 6.3 (7th ed. 1993) ("Time Calculation When Rehearing Sought Below"), *with id.*, § 6.4 ("Time Calculation When Judgment Below Is Changed") (citing cases).[3]

What could not have been anticipated when petitioners filed their Petition for Certiorari on August 31 was that the Wisconsin court not only would issue an order in response to PSC's withdrawal of its Motion for Clarification, but that in so doing the court would announce that it had construed that Motion as a motion for reconsideration. In sum, the Petition for Certiorari was indisputably timely when it was filed. To the extent that it now could be said to be premature, it was rendered so only by action of the court below subsequent to its filing.[4]

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[3] Petitioners' initial concern that a petition for certiorari filed before disposition of the Motion for Clarification might be premature was based on the possibility that the Wisconsin court might substantively amend its judgment in response to the Motion—not on the mere pendency of the Motion itself.

[4] While we have not found a reported case that raises precisely these facts, it is not difficult to imagine circumstances under which similar situations could arise. For example, under this Court's Rule 13(3), "[a] suggestion made to a United States court of appeals for a rehearing en banc is not a petition for rehearing within the meaning of this Rule *unless so treated by the United States court of appeals*" (emphasis added). If, after the filing of a petition for certiorari during the pendency of a suggestion for rehearing en banc, the court of appeals were, in disposing of the suggestion, to announce that it had "treated" the suggestion as a petition for rehearing and denied the same, an analogous situation would be

Allowing the Wisconsin Supreme Court's September 1 order retroactively to render the Petition for Certiorari untimely would be particularly inappropriate in light of the fact that the import of that order, as well as that of the Remittitur issued two days later, was *to confirm the finality of the June 10 judgment from which review was sought.* Under these circumstances, in granting the Petition for Certiorari in order to review the June 10 judgment of the Wisconsin Supreme Court, this Court would —both literally and in spirit—be well within the limits to its jurisdiction imposed by 28 U.S.C. § 1257(a), which restricts this Court's review to "[f]inal judgments" of the state courts, and 28 U.S.C. § 2101(c), which requires that review of any such judgment "shall be . . . applied for within ninety days after the entry of such judgment." The June 10 judgment clearly is the Wisconsin Supreme Court's final judgment, and the Petition for Certiorari was filed within 90 days from the entry of that judgment.[5]

2. Should the Court believe it necessary to do so, it may wish to treat the Petition for Certiorari as filed on the day of the Wisconsin Supreme Court's order—Sep-

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presented. While this hypothetical scenario, in which the decision below is from a federal court of appeals rather than a state court, may not raise the same issues of finality as does the instant case, it nonetheless illustrates the paradox that a timely petition for certiorari could be rendered untimely by a subsequent announcement of the lower court that it had "treated" a motion before it as something other than what it appeared on its face to be.

[5] It is worth observing in this regard that the only issue raised by the Motion for Clarification was a state-law issue, the resolution of which could have had no conceivable impact on the federal constitutional issue decided by the Wisconsin Supreme Court and presented for review in the Petition for Certiorari. This case thus falls within the class of cases recognized by this Court, albeit in a slightly different context, "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975). In such cases, this Court has declined to administer the finality requirement in "a mechanical fashion." *Id.* at 477.

tember 1, 1998—rather than the day before. This Court would be fully justified in so doing, and no party would suffer any conceivable prejudice were it to take that step. September 1 was well within the period for filing a petition to review the June 10 judgment of the Wisconsin Supreme Court. That 90-day period did not expire until September 8, and it is pure happenstance that the Petition actually was filed late on the afternoon of August 31 rather than early the next morning.

This is an important case which fully merits this Court's review. The Court should not allow its jurisdiction to be defeated under the circumstances presented.[6]

CONCLUSION

For the reasons stated above and in the Petition for Certiorari, the Petition should be granted.

Respectfully submitted,

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[6] Should the Court, contrary to what we have argued above, be of the opinion that any petition for certiorari filed prior to September 1 was jurisdictionally premature, and that the Petition cannot be treated as filed on that date, it should then follow its precedent in *Craig*, *supra*, and dismiss the Petition without prejudice to its renewal within the 90-day period that began on September 1. We submit, however, that such a course would elevate form over substance and is not necessary to comply with either the letter or the spirit of the statutes governing this Court's jurisdiction.

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APPENDICES

APPENDIX A

IN THE SUPREME COURT OF WISCONSIN

No. 97-0270

WARNER JACKSON, JENNIFER EVANS, WENDELL HARRIS, THE REVEREND ANDREW KENNEDY, RABBI ISAAC SERROTA, CEIL ANN LIBBER, FATHER THOMAS J. MUELLER, REVEREND JOHN N. GREGG, DIANE BREWER, COLLEEN BEAMAN, MARY MORRIS, PENNY MORSE, KATHLEEN JONES and PHILIP JONES,

Plaintiffs/Respondents,

v.

JOHN T. BENSON,
Superintendent of Public Instruction,
DEPARTMENT OF PUBLIC INSTRUCTION
and JAMES E. DOYLE,

Defendants/Appellants/ Petitioners,

and

MARQUELLE MILLER, CYNTHIA MILLER, ANGELA GRAY, ZACHARY GRAY, SHON RICHARDSON, GEORGE RICHARDSON, LATRISHA HENRY, FAYE HENRY, REIGNE BARRETT, VALERIE BARRETT, CANDICE WILLIAMS, SENTON WILLIAMS, CLINTRAI GILES, SHARON GILES,

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PARENTS FOR SCHOOL CHOICE, PILAR GONZALEZ, DINAH COOLEY, JULIE VOGEL, KATE HELSPER, BLONG YANG, GAIL CROCKETT, YOLANDA LASSITER, and JEANINE KNOX,

Intervenors/Defendants/ Appellants/Petitioners.

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, by its President, M. Charles Howard, MICHAEL LANGYEL, DONALD LUCIER, TRACY ADAMS, MILWAUKEE PUBLIC SCHOOLS ADMINISTRATORS AND SUPERVISORS COUNCIL, INC., by its Executive Director, Carl A. Gobel, PEOPLE FOR THE AMERICAN WAY, by its Executive Vice President and Legal Director, Elliot Mincberg, JOHN DREW, SUSAN ENDRESS, RICHARD RILEY, JEANETTE ROBERTSON, VINCENT KNOX, BERTHA ZAMUDIO, JAMES JOHNSON, ROBERT ULLMAN and SALLY F. MILLS,

Plaintiffs/Respondents,

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NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, FELMERS O. CHANEY, LOIS PARKER, on behalf of herself and her minor child, Rashaan Hobbs, DERRICK D. SCOTT, on behalf of himself and his minor children, Deresia C.A. Scott and Desmond L.J. Scott, CONSTANCE J. CHERRY, on behalf of herself and her minor children, Monique J. Branch, Monica S. Branch, and William A. Branch,

Plaintiffs/Respondents,

v.

JOHN T. BENSON,
Superintendent of Public Instruction of Wisconsin,
in his official capacity,

Defendant/Appellant.

On Appeal from the Final Order
of the Dane County Circuit Court
Judge Paul Higginbotham

MOTION FOR CLARIFICATION

Parents for School Choice, Pilar Gonzalez, Dinah Cooley, Julie Vogel, Kate Helsper, Blong Yang, Gail Crockett, Yolanda Lassiter and Jeanine Knox, Intervenors/Defendants/Appellants/Petitioners in the above-referenced case, respectfully move this Court for clarification of its decision dated June 10, 1998, pursuant to Wisconsin Rule of Appellate Procedure 809.14.

In its June 10 decision, this Court made clear that it was aware both that thousands of children who were eligible for full tuition under the program had already enrolled in private schools when it was enjoined and that if they remained in their private schools they would now be ineligible if the injunction is lifted because they are already attending private schools. Stating that "[t]heir

ineligibility is no fault of their own, but instead is solely a consequence of this litigation. Those children certainly are among the intended beneficiaries of this program. To require them to return to MPS for a year to reestablish eligibility would be manifestly inequitable and disruptive to the public schools, to the private schools, and most importantly, to the children themselves," this Court dissolved the injunction and held harmless the intended beneficiary school-children. Specifically, this Court said, "[i]n dissolving the injunction, we therefore remove the disability the injunction placed on schoolchildren, so that with respect to educational status, eligibility under the amended MPCP is determined on the date the injunction was issued." (¶ 113).

On June 25, 1998, the Wisconsin Department of Public Instruction issued a document entitled "Milwaukee Parental School Choice Program Student Application Form 1998-1999 School Year," a copy of which is attached to the affidavit of Daniel M. McKinley that is appended to this motion. *This document excludes from Program eligibility certain children who otherwise became eligible for the Program after the August 25, 1995 entry of the injunction halting portions of the Program.*[1] While excluding these children, who would have been eligible were it not for the injunction, the document defines as eligible those children who were eligible as of the date of

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[1] For example, if due to a change in circumstances after August 24, 1995 a Milwaukee family's income fell below 175% of the property level and a child of that family enrolled in private school, that child is ineligible to participate if he or she were in a grader higher than grade 3 in the 1997-98 school year. To become eligible, he or she must return to the Milwaukee Public Schools for a year.

Similarly, if an otherwise eligible family moved into Milwaukee after August 25, 1995, and enrolled a child in private school, and if that child were in a grade higher than grade 3 in the 1997-98 school year, he or she is ineligible to participate in the program, and must return to the Milwaukee Public Schools for a year to become eligible.

the injunction. According to the private scholarship program that has been providing partial scholarships to students prevented by the injunction from participating in the Program, as many as 250 students could be excluded from the Program based on the document issued by the Department of Public Instruction.[2] These are all students who would have been eligible for the Program had there not been an injunction.

We believe that this Court's language includes those children who would also lose their eligibility because of the injunction but whose eligibility occurred after the injunction was imposed. Like those children eligible on the date the injunction was issued, these later eligible children suffer a disability placed on them by the injunction, solely as a consequence of this litigation. They are among the intended beneficiaries of the program, their ineligibility is no fault of their own, and to require them to reestablish eligibility by returning to MPS for a year would be manifestly inequitable and disruptive to them.

We respectfully ask that the Court clarify that its intent was to remove the disability that the injunction placed on *all* schoolchildren whose eligibility would be adversely affected by the injunction's having been in effect. This small group of later-eligible children is similarly situated in all relevant respects to the group of schoolchildren who are unquestionably covered by your June 10 decision.

Dated this 26 day of June, 1998.

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[2] See Affidavit of Daniel M. McKinley, Executive Director of Partners Advancing Values in Education, appended to this motion.

Respectfully submitted,

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by Stephen P. Hurley
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APPENDIX B

IN THE SUPREME COURT OF WISCONSIN

No. 97-0270

WARNER JACKSON, JENNIFER EVANS, WENDELL HARRIS, THE REVEREND ANDREW KENNEDY, RABBI ISAAC SERROTA, CEIL ANN LIBBER, FATHER THOMAS J. MUELLER, REVEREND JOHN N. GREGG, DIANE BREWER, COLLEEN BEAMAN, MARY MORRIS, PENNY MORSE, KATHLEEN JONES and PHILIP JONES,

Plaintiffs/Respondents,

v.

JOHN T. BENSON,
Superintendent of Public Instruction,
DEPARTMENT OF PUBLIC INSTRUCTION
and JAMES E. DOYLE,

Defendants/Appellants/Petitioners,

and

MARQUELLE MILLER, CYNTHIA MILLER, ANGELA GRAY, ZACHARY GRAY, SHON RICHARDSON, GEORGE RICHARDSON, LATRISHA HENRY, FAYE HENRY, REIGNE BARRETT, VALERIE BARRETT, CANDICE WILLIAMS, SENTON WILLIAMS, CLINTRAI GILES, SHARON GILES,

Intervenors/Defendants/Appellants,

PARENTS FOR SCHOOL CHOICE, PILAR GONZALEZ, DINAH COOLEY, JULIE VOGEL, KATE HELSPER, BLONG YANG, GAIL CROCKETT, YOLANDA LASSITER, and JEANINE KNOX,

Intervenors/Defendants/Appellants/Petitioners.

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, by its President, M. Charles Howard, MICHAEL LANGYEL, DONALD LUCIER, TRACY ADAMS, MILWAUKEE PUBLIC SCHOOLS ADMINISTRATORS AND SUPERVISORS COUNCIL, INC., by its Executive Director, Carl A. Gobel, PEOPLE FOR THE AMERICAN WAY, by its Executive Vice President and Legal Director, Elliot Mincberg, JOHN DREW, SUSAN ENDRESS, RICHARD RILEY, JEANETTE ROBERTSON, VINCENT KNOX, BERTHA ZAMUDIO, JAMES JOHNSON, ROBERT ULLMAN and SALLY F. MILLS,

Plaintiffs/Respondents,

v.

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Superintendent of Public Instruction,
DEPARTMENT OF PUBLIC INSTRUCTION
and JAMES E. DOYLE,

Defendants/Appellants/ Petitioners,

and

MARQUELLE MILLER, CYNTHIA MILLER, ANGELA GRAY, ZACHARY GRAY, SHON RICHARDSON, GEORGE RICHARDSON, LATRISHA HENRY, FAYE HENRY, REIGNE BARRETT, VALERIE BARRETT, CANDICE WILLIAMS, SENTON WILLIAMS, CLINTRAI GILES, SHARON GILES,

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Plaintiffs/Respondents,

v.

JOHN T. BENSON,
Superintendent of Public Instruction of Wisconsin,
in his official capacity,

Defendant/Appellant.

On Appeal from the Final Order
of the Dane County Circuit Court
Judge Paul Higginbotham

WITHDRAWAL OF MOTION FOR CLARIFICATION

On June 26, 1998, Parents for School Choice, Pilar Gonzalez, Dinah Cooley, Julie Vogel, Kate Helsper, Blong Yang, Gail Crockett, Yolanda Lassiter and Jeanine Knox, Intervenors / Defendants / Appellants / Petitioners in the above-referenced case, filed a Motion for Clarification. The motion related to the eligibility status of certain children with respect to the Milwaukee Parental Choice Program.

As the Milwaukee Public Schools commenced the school year on August 26, of necessity the circumstances of the schoolchildren are now settled. Moreover, the pendency of the motion could create uncertainty over the finality of this Court's decision in this case.

For the foregoing reasons, Intervenors/Defendants/Appellants/Petitioners Parents for School Choice, et al., respectfully withdraw the Motion for Clarification.

Dated this 27th day of August, 1998.

Respectfully submitted,

/s/ Kristine A. Edwards

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APPENDIX C

Office of the Clerk
SUPREME COURT
Madison, Wisconsin 53701-1688

September 1, 1998

97-0270

WARNER JACKSON *et al.*

v.

JOHN T. BENSON *et al.*

ORDER

On June 26, 1998, Parents for School Choice et al, by Attorney Clint Bolick, filed a Motion for Clarification of the opinion issued on June 10, 1998, which motion was construed as a Motion for Reconsideration to Clarify the Opinion; on July 8, 1998, Milwaukee Teachers' Education Association, by Attorney Richard Saks, filed a response to the motion; on August 27, 1998, Parents for School Choice et al, by Attorney Clint Bolick, filed a Motion to Withdraw the Motion for Clarification,

The Court having considered the motions and response,

IT IS ORDERED that the Motion to Withdraw the Motion for Reconsideration to Clarify the Opinion is granted.

Ann Walsh Bradley, J. did not participate.

MARILYN L. GRAVES
Clerk of Supreme Court

APPENDIX D

SUPREME COURT
OF WISCONSIN

OFFICE OF THE CLERK
Madison, Wisconsin 53701-1688

Case No. 97-0270
Trial Court Case No. 95 CV 1982, 95 CV 1997, 96 CV 1889

WARNER JACKSON, JENNIFER EVANS, WENDELL HARRIS, THE REVEREND ANDREW KENNEDY, RABBI ISAAC SEROTA, CEIL ANN LIBBER, FATHER THOMAS J. MUELLER, REVEREND JOHN N. GREGG, DIANE BREWER, COLLEEN BEAMAN, MARY MORRIS, PENNY MORSE, KATHLEEN JONES and PHILIP JONES,
Plaintiffs/Respondents,

v.

JOHN T. BENSON,
Superintendent of Public Instruction,
DEPARTMENT OF PUBLIC INSTRUCTION
and JAMES E. DOYLE,
Defendants/Appellants/ Petitioners,

and

MARQUELLE MILLER, CYNTHIA MILLER, ANGELA GRAY, ZACHARY GRAY, SHON RICHARDSON, GEORGE RICHARDSON, LATRISHA HENRY, FAYE HENRY, REIGNE BARRETT, VALERIE BARRETT, CANDICE WILLIAMS, SENTON WILLIAMS, CLINTRAI GILES, SHARON GILES,
Intervenors/Defendants/ Appellants,

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Plaintiffs/Respondents,

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DEPARTMENT OF PUBLIC INSTRUCTION
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MARQUELLE MILLER, CYNTHIA MILLER, ANGELA GRAY, ZACHARY GRAY, SHON RICHARDSON, GEORGE RICHARDSON, LATRISHA HENRY, FAYE HENRY, REIGNE BARRETT, VALERIE BARRETT, CANDICE WILLIAMS, SENTON WILLIAMS, CLINTRAI GILES, SHARON GILES,

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Plaintiffs/Respondents,

v.

JOHN T. BENSON,
Superintendent of Public Instruction of Wisconsin,
in his official capacity,

Defendant/Appellant.

REMITTITUR Date: September 03, 1998

This cause was a review of the order/decision of the court of appeals.

IT IS ORDERED AND ADJUDGED by this court in an opinion filed on June 10, 1998, that:

The decision of the court of appeals is reversed, and the cause is remanded to the circuit court for further proceedings consistent with this opinion.

Hon. Donald W. Steinmetz wrote decision/opinion, 070 pages.

Hon. Shirley S. Abrahamson joined dissenting opinion.

Hon William A. Bablitch wrote dissenting opinion, 001 pages.

Hon. Ann Walsh Bradley took no part.

The appeal record is hereby returned to the Clerk of Circuit Court for Dane County.

I certify that the above is a correct transcript of the original order and judgment of the court in the above cause.

MARILYN L. GRAVES
Clerk of Supreme Court

APPENDIX E

IN THE SUPREME COURT OF THE UNITED STATES

No. 98-376

WARNER JACKSON, *et al.*,
Petitioners,

v.

JOHN T. BENSON, *et al.*,
Respondents.

AFFIDAVIT OF JEFFREY J. KASSEL

Jeffrey J. Kassell declares as follows pursuant to 28 U.S.C. § 1746:

1. I am an attorney admitted to practice in the State of Wisconsin and in the Supreme Court of the United States. I am one of the attorneys representing the petitioners in this case.

2. On June 26, 1998, respondents Parents for School Choice, et al., filed a "Motion for Clarification" in the Wisconsin Supreme Court. The motion related solely to the eligibility of certain children to participate in the Amended Milwaukee Parental Choice Program as a result of the Wisconsin Supreme Court's June 10, 1998 decision upholding the Program and dissolving the injunction that barred implementation of the Program. The "Motion for Clarification" did not address the merits of the Wisconsin Supreme Court's decision but sought only a clarification with regard to the implementation of the court's order that the injunction be dissolved.

3. On August 27, 1998, respondents Parents for School Choice, et al., filed a document entitled "Withdrawal of Motion for Clarification" in the Wisconsin Supreme Court.

4. At approximately 2:30 p.m. on the afternoon of August 27, 1998, I telephoned the office of the Clerk of the Wisconsin Supreme Court. I spoke with a deputy clerk of court who confirmed that the "Withdrawal of Motion for Clarification" had been filed. I asked the deputy clerk whether the court would issue an order pertaining to the withdrawal of the motion. She told me that the court would not issue any order but that it would simply return the record to the trial court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 4, 1998.

/s/ Jeffrey J. Kassel
JEFFREY J. KASSEL

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Supreme Court, U.S.
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(5)

No. 98-376

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WARNER JACKSON, *et al.*,

Petitioners,

v.

JOHN T. BENSON, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Wisconsin

---

BRIEF IN OPPOSITION

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September 30, 1998

33 pp

QUESTION PRESENTED

Whether the Milwaukee Parental Choice Program—which, in conjunction with existing programs within the Milwaukee Public School ("MPS") system, affords low-income MPS families the opportunity to educate their children at public, private non-sectarian, or private sectarian schools—violates the Establishment Clause?

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INTRODUCTORY STATEMENT

Respondents John T. Benson, *et al.* ("the State of Wisconsin" or "the State") hereby oppose the Petition for Writ of Certiorari. The issue presented in this case is whether the Milwaukee Parental Choice Program—a "school choice" program which, in conjunction with existing programs within the Milwaukee Public School ("MPS") system, affords low-income MPS families the opportunity to educate their children at public, private non-sectarian, or private sectarian schools—violates the Establishment Clause of the First Amendment (as incorporated by the Fourteenth Amendment). That issue is of profound legal and practical importance, both to Wisconsin and to the Nation. Nonetheless, two factors counsel in favor of awaiting a later opportunity to address the constitutionality of school choice programs.

First, contrary to Petitioners' assertion, this important federal question has *not* been decided by the Supreme Court of Wisconsin "'in a way that conflicts with relevant decisions of this Court.'" Pet. at 9 (quoting Sup. Ct. R. 10(c)). To the contrary, a ruling *invalidating* the Milwaukee Parental Choice Program ("the expanded Choice Plan") on Establishment Clause grounds would have been in conflict with a half-century's worth of this Court's precedents—stretching from *Everson v. Board of Educ.*, 330 U.S. 1 (1947), through more recent decisions such as *Mueller v. Allen*, 463 U.S. 388 (1983), *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995), and *Agostini v. Felton*, 117 S. Ct. 1997 (1997). The Wisconsin court conducted a thorough review of this Court's Establishment Clause jurisprudence, and, based on that review, correctly ruled that any state funding that flows to sectarian schools under the expanded Choice Plan does so only on a *neutral* and *indirect* basis, and therefore is constitutionally permissible under the Establishment Clause.

Second, the State agrees with Petitioners that this Court would provide a valuable service by clarifying whether its 1973

decision in *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, remains "good law." This case, however, presents a poor opportunity for such clarification. The Wisconsin court did not dispute that *Nyquist* constitutes "good law"; it simply determined—and correctly so—that *Nyquist* was "not controll[ing]" because the expanded Choice Plan is distinguishable from the New York tuition reimbursement program invalidated in *Nyquist*. For example, the state court concluded that whereas the *Nyquist* program "directed aid exclusively to private schools and their students," the expanded Choice Plan, "viewed in its surrounding context, merely adds religious schools to a range of pre-existing educational choices available to MPS children." Pet. App. 19a n.9. Because *Nyquist* is distinguishable in this and other ways, this case does not present a fitting opportunity for the Court to declare definitively whether *Nyquist* remains "good law," which is the sort of ruling Petitioners appear to be seeking. Instead, the case presents only an opportunity to determine once again the extent to which certain *dictum* in *Nyquist* has relevance in other factual settings. A better vehicle for accomplishing Petitioners' goal—*i.e.*, for clarifying, once and for all, whether *Nyquist* remains "good law"—would be a case in which a lower court found the challenged law *indistinguishable* from *Nyquist*, and expressly stated that the court was constrained to follow *Nyquist*, notwithstanding its apparent obsolescence. It is possible that such a ruling will emerge in the near future: Although there is no current lower court conflict regarding the constitutionality of school choice programs, the high courts of Arizona, Maine, Ohio and Vermont are presently considering similar challenges to school choice programs.

For these reasons, the State respectfully suggests that resolution of the critically important question of the constitutionality of school choice programs should await a more suitable vehicle, which may emerge as more lower courts are called upon to resolve that question.

COUNTERSTATEMENT OF THE CASE

Any consideration of the constitutionality of the expanded Choice Plan must begin with a frank recognition of the serious problems facing the MPS. It is beyond dispute that the students and schools in the MPS face the most profound educational challenges in the State of Wisconsin. Indeed, in a decision upholding the constitutionality of the original version of the Choice Plan, the Wisconsin Supreme Court recognized that "the Milwaukee Public School District has significantly greater education and poverty problems than any other school district in the state." *Davis v. Grover*, 166 Wis.2d 501, 529, 480 N.W.2d 460, 469 (1992). The court based that assessment on "[t]he statistical data," which "clearly illustrates that the socioeconomic disparities and the educational problems are greater in the large urban area of Milwaukee than any other part of Wisconsin." *Id.* at 529-30, 480 N.W.2d at 470; *see also Kukor v. Grover*, 148 Wis.2d 469, 482-83, 436 N.W.2d 568, 573-74 (1989).

By any measure of educational performance, MPS has performed dismally. For example, in 1989, when the original Choice Plan was under consideration, the dropout rate for high-school students reached 14.4 percent. *See Davis*, 166 Wis.2d at 529, 480 N.W.2d at 469. At the same time, schools in the rest of the state experienced a much lower dropout rate of 3.11 percent. *See id.* In 1989, less than 45 percent of MPS students graduated from high school within six years—down from 57 percent just five years earlier. *See id.* at 531, 480 N.W.2d at 470. And of those who did graduate within six years in 1989, more than one-third did so with a "D" average. *See id.*

The Wisconsin Supreme Court in *Davis v. Grover* found that these realities "dramatically show the need for legislative attention." *Id.* at 529, 480 N.W.2d at 469.

I. The Milwaukee Parental Choice Program: As Originally Enacted, and as Subsequently Expanded.

That legislative attention led to the enactment of the original Milwaukee Parental Choice Program in 1989 ("the original Choice Plan"), and continued with the expanded Choice Plan now under challenge. 1995 Wis. Act 27, §§ 4002-09; Wis. Stat. § 119.23. As described below, all of these efforts at educational reform by the Wisconsin legislature have been directed, first and foremost, at solving an educational crisis affecting students in the State's largest public school system—not at promoting private sectarian education.

A. The original Choice Plan.

Over the past 25 years, a variety of programs—including desegregation, special school financing, and the introduction of specialized magnet schools—have been initiated to address MPS' unique problems. None of these programs averted the worsening situation. As the Wisconsin Supreme Court acknowledged in *Davis*, the original Choice Plan was a direct response to the continuing poor performance of Milwaukee students despite decades of state programming targeted at reforming MPS: "The program [was] an attempt to identify factors which could improve the quality of education." *Davis*, 166 Wis. 2d at 512 n.2, 480 N.W.2d at 462 n.2.

The Wisconsin legislature, long familiar with choice-inspired solutions to educational problems, responded to the troubles of the MPS system in 1989 by enacting the original Choice Plan, Wis. Stat. § 119.23 (West 1991 & Supp. 1994). The original Plan provided a limited number of MPS students[1] from low-income families[2] the opportunity to attend certain

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[1] The original Plan was limited in scope, affording these expanded educational opportunities to only 1.5 percent of MPS students.

[2] Participation in the Plan was, and remains, limited to families whose (continued...)

private schools, which had elected to participate in the Plan. The original Plan was limited to "nonsectarian" private schools. *See* Wis. Stat. § 119.23(2)(a). Under the original Choice Plan, therefore, financially-strapped families in Milwaukee could choose among several options for the education of their children, including neighborhood public schools, public magnet schools, and non-sectarian private schools. The only educational option denied these parents was sectarian private schools.

B. The expanded Choice Plan.

The limited nature of the original Choice Plan hampered its ability to solve the ills of the MPS. The Governor of Wisconsin, Hon. Tommy G. Thompson, responded to these shortcomings by proposing an expansion of the original Plan to ensure that low-income families would have the same full range of educational options that was available to other families. Specifically, the Governor proposed amending the original Plan to include sectarian schools and thereby eliminate any discrimination among private schools. *Id.*

After extensive public hearings and floor debate, the legislature enacted the expanded Plan. *See* 1995 Wis. Act 27, §§ 4002-09. The amendments effected a number of changes to the original Plan, all tailored to ensure the efficacy and neutrality of the program. Some of the amendments addressed aspects of the original Plan other than its exclusion of sectarian schools. For example, § 4003 of the amendments expanded the number of Milwaukee area children eligible to participate in the Plan—from 1.5 percent of MPS students in the original Plan, to 15 percent under the expanded Plan. Other amendments, meanwhile, related to the opening of the Plan to sectarian school participation.

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[2] (...continued)
income does not exceed 175 percent of the poverty level. Wis. Stat. § 119.23(2)(a)(1).

First, the legislature struck the word "non-sectarian" from the statute, thereby expanding the original Plan to encompass both private non-sectarian and private sectarian schools located in Milwaukee. *See id.* at § 4002; Wis. Stat. § 119.23(2)(a). By virtue of this expansion, the expanded Plan rounds out the battery of educational options available to parents of Milwaukee students.

Second, to ensure that no private schools—sectarian or nonsectarian—receive any monies not directly related to the cost of education, the legislature also changed the basis for determining payment to the schools. Under the original Plan, schools received (for each student attending pursuant to the Plan) an amount equal to the total amount to which MPS is entitled under Wis. Stat. § 121.08, divided by the district's membership. Under the expanded Plan, by contrast, payments are now limited to the lesser of the MPS amount or an amount equal to the private school's operating costs per pupil, as determined by the Department of Public Instruction. *See* 1995 Wis. Act 27, § 4005; Wis. Stat. § 119.23(4).

Third, the expanded Plan ensures that no participating student is forced to participate in any religious activity, by providing an explicit opt-out right. *See id.* at § 4008e; Wis. Stat. § 119.23(7)(c).

Finally, the expanded Plan also includes an additional safeguard—a further guarantee that no public funds flow directly to private schools. Accordingly, under the expanded Plan, tuition checks are made payable by the State Superintendent directly to the parent or guardian. *See id.* 1995 Wis. Act 27, § 4006m; Wis. Stat. § 119.23(4). The Department of Public Instruction mails the checks to the private school designated by the parent, but only as a result of the parent first having selected that school from the array of available choices. And, even after the check arrives at the school, the school receives no state funding until the parent actually endorses the check. *Id.*

II. Prior Proceedings and Disposition.

Shortly after the original Choice Plan was enacted in 1989, opponents of school choice programs—including several of the Petitioners who are now before this Court—filed suit to enjoin the Plan on various state constitutional grounds. The Supreme Court of Wisconsin ultimately rejected their challenge to the original Plan. *Davis v. Grover, supra.*

When the legislature enacted the 1995 Amendments, school choice opponents once again promptly sought to enjoin implementation of the expanded Choice Plan. The present litigation thus began on August 1, 1995, when two groups of plaintiffs—Petitioners Warner Jackson, *et al.* ("ACLU"), and Petitioners Milwaukee Teachers Educational Association, *et al.*—filed complaints in the Circuit Court of Dane County, Wisconsin, challenging the expanded Plan on a host of constitutional grounds.[3] To the various state-constitution-based, non-religion-clause claims that Petitioners had advanced in their attempt to defeat the original Plan, Petitioners now added (1) a claim under the Establishment Clause of the First Amendment to the federal constitution, and (2) a similar claim based on Art. I, § 18 of the Wisconsin Constitution,[4] contending that the expanded Choice Plan impermissibly conferred a "benefit" on religious institutions.

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[3] Petitioners NAACP, *et al.* later filed a separate action challenging the expanded Plan, adding a claim under the Equal Protection Clause of the Fourteenth Amendment. The state supreme court dismissed the equal protection claim, *see* Pet. App. 56a, and Petitioners have not sought review of that aspect of the decision below. *See* Pet. at 6 n.2.

[4] Art. I, § 18 of the Wisconsin Constitution provides, in relevant part, that "[no person shall] be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall . . . any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

After receiving Petitioners' complaints, the State—acting on relation of Governor Thompson—commenced an original action in the Supreme Court of Wisconsin, seeking a declaration that the expanded Choice Plan was constitutional. The state supreme court accepted original jurisdiction, and on March 29, 1996, announced that it had deadlocked 3-3 on the constitutional issues (with the seventh Justice not participating). *See* Pet. App. 189a-191a. Having divided equally, the state supreme court dismissed the petition, effectively remanding the case to the Circuit Court of Dane County for further proceedings. *Id.* at 191a.

In January 1997, the circuit court granted summary judgment for Petitioners. *See* Pet. App. 138a-188a. The court concluded, *inter alia*, that "by permitting religious schools to participate in the program," the expanded Plan violated Art. I, § 18 of the Wisconsin Constitution. *Id.* at 169a. Having found the expanded Plan invalid on state grounds, the circuit court did not reach the Establishment Clause issue.

The court of appeals affirmed by a 2-1 vote. *See* Pet. App. 59a-137a. Like the circuit court, the court of appeals "conclude[d] that the amended program violates the religious benefit clause of Article I, section 18 of the Wisconsin Constitution," *id.* at 61a, and therefore found it "unnecessary to address" Petitioners' Establishment Clause challenge, *id.* at 87a. Although it did not formally rule on the Establishment Clause issue, the court of appeals "consult[ed] United States Supreme Court [Establishment Clause] cases applying the 'primary effect' test" in conducting its Art. I. § 18 analysis. *Id.* at 80a. Relying exclusively on *Nyquist*, the court found that the "primary effect" test did "not undermine" its conclusion that the expanded plan was invalid under Art. I, § 18. *Id.*

The Supreme Court of Wisconsin granted Petitions for Review, and, by a 4-2 margin,[5] reversed the court of appeals' ruling and rejected *all* of Petitioners' various challenges to the expanded Plan.

The state supreme court rejected Petitioners' Establishment Clause claim following a thorough review of this Court's jurisprudence. *See* Pet. App. 11a-31a. The court analyzed the expanded Choice Plan's constitutionality under the *Lemon* framework, explaining that "[w]hile the continued authority of the test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is uncertain, we have no choice but to apply it in this case." Pet. App. 14a n.5. Disposing of the "secular purpose" and "excessive entanglement" inquiries in fairly short order, *see id.* at 14a-15a, 29a-31a, the court devoted the bulk of its analysis to the issue on which the parties had focused, namely whether the expanded Choice Plan would "have the primary effect of advancing religion," *see id.* at 15a-28a.

To answer that question, the Wisconsin court canvassed 50 years of this Court's Establishment Clause rulings. From that body of law, the court "distill[ed] . . . an underlying theory based on neutrality and indirection: state programs that are wholly neutral in offering educational assistance directly to citizens in a class defined without reference to religion do not have the primary effect of advancing religion." Pet. App. 16a-17a (footnotes omitted). With respect to *neutrality*, the Wisconsin court noted that ever since *Everson v. Board of Educ.*, 330 U.S. 1 (1947), "[t]he Supreme Court has historically looked to whether a program is neutral toward religion in defining its beneficiaries." Pet. App. 16a n.6 (citing *Everson*; *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Roemer v. Md. Bd. of Public Works*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S.

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[5] The two dissenting Justices would have invalidated the expanded Plan under Art. I, § 18 of the state constitution. They did not address the Establishment Clause issue. *See* Pet. App. 58a.

734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Board of Educ. v. Allen*, 392 U.S. 236 (1968)). And with regard to the principle of *indirection*, the Wisconsin court observed that this Court has traditionally "also focused on whether public aid that flows to religious institutions does so only as a result of 'genuinely independent and private choices of the aid recipients.'" Pet. App. 16a-17a n.7 (citing *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Mueller v. Allen*, 463 U.S. 388 (1983); *Board of Educ. v. Allen*; *Everson*).

Based on its review of the applicable precedents, the state court concluded that:

> The Supreme Court, in cases culminating in *Agostini*, has established the general principle that state educational assistance programs do not have the primary effect of advancing religion if those programs provide public aid to both sectarian and nonsectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age children.

Id. at 25a.

The Wisconsin court then explained in detail why the expanded Choice Plan "is precisely such a program." *See id.* at 25a-28a. *First*, the court observed that the Plan "is in no way 'skewed toward religion.'" *Id.* at 26a (quoting *Witters*). Instead, it simply "provides a neutral benefit to beneficiaries selected on religious-neutral criteria," and therefore "neither leads to 'religious indoctrination,' . . . nor 'creates a financial incentive for students to undertake sectarian education.'" *Id.* at 27a (quoting *Agostini*, *Witters*, and *Zobrest*). *Second*, the court concluded that because state funds arrive at a private school only as a result of a parent's first having chosen that

school—and because, even then, the funds take the form of a check made out to the parent (to "be cashed only for the cost of the student's tuition")—"[a]ny aid provided under the [expanded Choice Plan] that ultimately flows to sectarian private schools . . . does so 'only as a result of genuinely independent and private choices of aid recipients.'" *Id.* at 27a (quoting *Witters*).

Significantly, the court expressly considered, and rejected, Petitioners' contention that *Nyquist* required the invalidation of the expanded Choice Plan.

As an initial matter, the court noted that "*Nyquist specifically reserved the issue* whether an educational assistance program that was both neutral and indirect would survive an Establishment Clause challenge." Pet. App. 19a (emphasis added). As the Wisconsin court noted, this Court in *Nyquist* declined to decide whether "'a case involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited'" would come out differently than *Nyquist*. *Id.* (quoting *Nyquist*, 413 U.S. at 782 n.38).

Next, drawing on its familiarity with the extensive array of educational options that the Wisconsin legislature has made available to MPS students, the court also emphasized what it termed "significant distinctions" between the tuition reimbursement program at issue in *Nyquist* and the expanded Choice Plan. *Id.* at 19a n.9. The court explained that:

> In *Nyquist*, each of the facets of the challenged program directed aid exclusively to private schools and their students. The [expanded Choice Plan], by contrast, provides a neutral benefit to qualifying parents of school-age children in Milwaukee Public Schools. Unlike the program in *Nyquist*, the only financially-qualified Milwaukee students excluded from participation in the

> [expanded Choice Plan] are those in the fourth grade or higher who are already attending private schools. The [expanded Choice Plan], viewed in its surrounding context, merely adds religious schools to a range of pre-existing educational choices available to MPS children. This seminal fact takes the [expanded Choice Plan] out of the *Nyquist* construct and places it within the framework of neutral educational assistance programs.

Id. *See also id.* at 26a ("The [expanded Choice Plan], in conjunction with existing state educational programs, gives participating parents the choice to send their children to a neighborhood public school, a different public school within the district, a specialized public school, a private nonsectarian school, or a private sectarian school. As a result, the amended program is in no way 'skewed toward religion.'") (footnote and citation omitted); *id.* at 26a n.16.

Having found the expanded Choice Plan permissible under the Establishment Clause, the court proceeded to reject the remainder of Petitioners' challenges to the Plan—challenges based on various state constitutional provisions, as well as the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 31a-57a.

The Wisconsin Supreme Court's ruling not only restored the full array of educational options that the legislature had envisioned as the solution to the problems of MPS, but also restored a measure of predictability to MPS students for the first time in nearly three years. On August 25, 1995, shortly after accepting original jurisdiction, the supreme court had enjoined implementation of the expanded Choice Plan in its entirety. Although later narrowed by the circuit court to enjoin only those aspects of the Plan relating to sectarian school participation, that injunction had remained in place for nearly three full academic years. As a consequence, the intended beneficiaries of the expanded Choice Plan—namely, MPS students from low-income families—had been forced to

contend both with a reduced menu of educational choices, and with substantial uncertainty.[6] The decision below removed that cloud. Having "conclude[d] that the amended program is constitutional in its entirety," the state supreme court "order[ed] the circuit court to dissolve the injunction for all portions of the [expanded Choice Plan]." Pet. App. 56a.

REASONS FOR DENYING THE WRIT

I. The Supreme Court of Wisconsin Correctly Ruled That, Under This Court's Precedents, the Expanded Choice Plan is a Neutral and Indirect State Funding Program That Does Not Violate the Establishment Clause.

Contrary to Petitioners' claim, the court below did not decide the Establishment Clause issue "'in a way that conflicts with relevant decisions of this Court.'" Pet. at 9 (quoting Sup. Ct. Rule 10(c)). As the Wisconsin court recognized, this Court's Establishment Clause jurisprudence has long stressed two core principles: (1) the importance of *neutrality*, and (2) the need to avoid *direct government funding* of religion. It is now firmly established that government programs that provide benefits to sectarian and nonsectarian institutions alike, and do so only indirectly, do not have the "primary effect" of advancing or endorsing religion and do not violate the Establishment Clause. The expanded Choice Plan is such a

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[6] For example, when the state supreme court's injunction first issued, "thousands of children who were eligible for full tuition under the program already had enrolled in or begun attending their new private schools." Pet. App. 56a-57a. Faced with having to remove their children from their chosen schools, many parents were forced to seek interim private assistance to keep their children in those schools. *Id.* at 57a.

program, and the Wisconsin court's rejection of Petitioners' Establishment Clause claim therefore was correct.[7]

This Court's religion cases uniformly have stressed the importance of government neutrality toward religion. The neutrality principle has played a role in almost every effort to interpret the Establishment Clause, and to reconcile it with the Free Exercise Clause. *See, e.g., Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947); *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968).

More recently, this Court has emphasized that a policy of "neutrality" under the Establishment Clause does not necessitate or justify the exclusion of sectarian institutions from benefits, programs or facilities that the government makes available to non-sectarian organizations. The Court has held, for example, that a public school that opens its facilities to secular institutions cannot simultaneously deny access to sectarian organizations. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981); *see also Capitol Square Review & Advisory Bd. v. Pinette*, 513 U.S. 1106 (1995). Excluding sectarian groups in these circumstances "demonstrate[s] not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248.

In addition to neutrality, this Court repeatedly has emphasized the absence of direct government aid (or direct government control over the destination of funds) in upholding

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[7] The State recognizes that the Brief in Opposition is normally not the place for extensive argument on the merits. However, given that Petitioners' request for certiorari is bottomed on the allegation that the Wisconsin court's decision "conflicts with relevant decisions of this Court," Pet. at 9 (quoting S. Ct. R. 10(c)), the State believes that a detailed review of this Court's precedents (and the ways in which the decision below is entirely consistent with those precedents) is called for by way of rebuttal.

programs against Establishment Clause challenges. In its first decision applying the Establishment Clause to the States, the Court upheld a program that reimbursed parents for the cost of transporting their children to and from sectarian schools. *See Everson*, 330 U.S. at 17-18. And when the Court next considered government aid to sectarian schools, it upheld New York's policy of loaning textbooks to sectarian school students free of charge. *See Board of Educ. v. Allen*, 392 U.S. at 243-44. In approving this textbook loan program, the Court specifically noted that "no funds or books are furnished to parochial schools, and *the financial benefit is to parents and children, not to schools.*" *Id.* (emphasis added).

Later decisions of the Court have emphasized the indirect nature of the aid approved in these early cases. In *Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971), for example, the Court observed that in *Everson* and *Board of Educ. v. Allen* "the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school." *Accord Roemer v. Md. Board of Public Works*, 426 U.S. 736 (1976); *Meek v. Pittenger*, 421 U.S. 349, 360-61 (1975) (upholding textbook loan provision).

But the Court's longstanding emphasis on neutrality and indirection as hallmarks of legislative initiatives that do not run afoul of the Establishment Clause was made most clear in a recent line of cases beginning with *Mueller v. Allen*, 463 U.S. 388 (1983). In *Mueller*, the Court approved a Minnesota statute that permitted parents to deduct expenses related to their children's education—including educational costs at private sectarian schools. In upholding the statute, the Court emphasized that "under Minnesota's arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children." *Id.* at 399. The Court concluded:

> The historic purposes of the clause simply do not encompass the sort of attenuated financial benefit,

> ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.

Id. at 400.

The Court reaffirmed the importance of individual choice and indirect aid three years later in *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986). *Witters* upheld Washington's grant of state money to a blind student so that he could receive theological training at the Inland Empire School of the Bible. Justice Marshall, writing for a unanimous Court, stressed that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 488. *See also id.* at 490-91 (Powell, J., concurring) (emphasizing this point); *id.* at 493 (O'Connor, J., concurring) (same). The Court observed that when individuals, rather than the government, determine whether (and how much) money flows to a sectarian organization, the effect is no more constitutionally troubling than when a government employee donates his paycheck to his church or synagogue. *See id.* at 486-88.

The Court again emphasized the core principle of indirection in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). In *Zobrest*, the Court upheld the government's provision of an interpreter for a student in a sectarian school. The Court characterized the statute at issue as "a neutral government program dispensing aid not to schools but to individual handicapped children," *id.* at 13, even though, as a formal matter, the government, not the parents, directly paid for the cost of the interpreter, *see id.* at 13-14 & n.11. The dispositive factor in *Zobrest* was that the sectarian school would not have received any benefit but for the parents' intervening choice. "[A]ny attenuated financial benefit that parochial schools do ultimately receive from the [statute] is attributable to 'the

private choices of individual parents.'" *Id.* at 12 (quoting *Mueller*, 463 U.S. at 400).

The Court reaffirmed both the indirection and neutrality principles in *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995). *First*, the Court noted that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Id.* at 839. Second, all nine Justices reaffirmed that government funding that reaches sectarian institutions indirectly, and through a neutral program, does not raise Establishment Clause concerns. *See id.* at 838-40; *id.* at 880-81 (Souter, J., dissenting). The question that divided the Court in *Rosenberger* was whether the aid at issue was "direct" or "indirect" as the Court had used those terms in earlier cases. Under the University of Virginia's program, student publications did not receive funds directly from the University; instead, the University paid the money to a printer at the direction of the publication. The majority concluded that this funding mechanism was sufficiently indirect. *See id.* at 841-45. The dissenters disagreed. *See id.* at 886 (Souter, J., dissenting). But it was common ground to all nine Justices that the funding would have been sufficiently indirect if there had been a "third party standing between the government and the ultimate religious beneficiary to break the circuit by its independent discretion to put state money to religious use." *Id.* (Souter, J., dissenting).

Petitioners attempt to make much of the fact that, in her separate concurrence, Justice O'Connor (who also joined the Court's opinion) stated that *Rosenberger* did not "trumpet[] the supremacy of the neutrality principle." 515 U.S. at 852 (O'Connor, J., concurring). But what Petitioners fail to mention is that Justice O'Connor in no way suggested that neutrality was not a central principle in Establishment Clause analysis, and indeed referred to it as a "bedrock principle[]." 515 U.S. at 847. Moreover, Petitioners conveniently ignore

Justice O'Connor's ultimate conclusion—that the funding provided by the University (which was not only neutral but *also indirect*) was furnished in a context that precluded any perception of government endorsement of a group's religious message. *Id.* at 849-51 (O'Connor, J., concurring). The same is true of the expanded Choice Plan. When a Choice Plan family, presented with an array of choices, elects to send its child to a private sectarian school, "'[n]o reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief.'" *Id.* at 848 (O'Connor, J., concurring) (quoting *Witters*, 474 U.S. at 493 (O'Connor, J., concurring)).

This line of cases—*Mueller*, *Witters*, *Zobrest* and *Rosenberger*—thus stands for a critical proposition: The intervening autonomous choices of individuals eliminate the constitutional difficulties raised by *direct* government aid to sectarian schools. Factors that have proven fatal to direct government aid to schools lose their significance when government money flows to sectarian schools only as a consequence of the individual choice of a third party. For example, *Zobrest* approved aid to Salpointe Catholic High School even though the parties had stipulated that Salpointe was pervasively sectarian. *See* 509 U.S. at 4 & n.1; *id.* at 18-20 (Blackmun, J., dissenting).[8] Likewise, in *Witters*, the Court concluded that, when aid flows to religious organizations only

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[8] Petitioners' flaunting of the "pervasively sectarian" character of the sectarian Choice Plan schools, *see, e.g.*, Pet. at i, 4, 22, is therefore wholly misguided. As noted above, Salpointe Catholic High School was likewise "pervasively sectarian"—its "'distinguishing purpose'" was "'the inculcation in its students of the faith and morals of the Roman Catholic Church.'" *Zobrest*, 509 U.S. at 18 (Blackmun, J., dissenting). And in *Witters*, the Inland Empire School of the Bible was, of course, pervasively sectarian. Yet the fact that state funding reached those schools only on a neutral and indirect basis—as under the expanded Choice Plan—disposed of any constitutional objections to that funding.

as a result of private choices, objections based on the lack of restrictions on the recipient's use of the funds are "not apposite." *See* 474 U.S. at 489.[9]

The Court's decision two Terms ago in *Agostini v. Felton*, 117 S. Ct. 1997 (1997), reemphasized these themes. There, the Court overruled *Aguilar v. Felton*, 473 U.S. 402 (1985), observing that "Establishment Clause law has 'significantly changed'" in recent years, and that in particular "[w]hat has changed . . . is our understanding of the criteria used to assess whether aid to religion has an impermissible effect." *Id.* at 2017, 2010. In particular, the Court—citing *Witters* and *Zobrest*—noted that it had rejected the notion that "any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking." *Id.* at 2010-12. In addition, the Court observed that its recent Establishment Clause decisions focused on whether state aid "creat[es] a financial incentive to undertake religious indoctrination," or whether, instead, "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* at 2014. The Court explained that, pursuant to this principle of neutrality, it had "sustained programs that provided aid to all eligible children, regardless of where they attended school." *Id.* (citing, *inter alia*, *Mueller*, *Witters*, and *Zobrest*). Informed by these principles, the Court ruled that the Establishment Clause presented no barrier to New York City's Title I program ("a federally funded program

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[9] It is for this reason, among others, that Petitioners are mistaken in their casual assertion that the decision below conflicts with the precedents of this Court listed in footnote 11 of the Petition. Although this Court has required that *direct* state aid to religious institutions be accompanied by certain safeguards to ensure that the aid is not spent for religious purposes, the Court has not required the same where (as here) the aid is *indirect*.

providing supplemental, remedial instruction to disadvantaged children on a neutral basis"), which the Court had found invalid in *Aguilar*. *Id.* at 2016.

The Court's Establishment Clause precedents, culminating in *Agostini*, thus confirm that programs that provide public aid to sectarian institutions (1) on a neutral basis and (2) only as a result of private decisionmaking do not have the "primary effect" of advancing religion, and therefore pass constitutional muster.

As the Wisconsin court correctly concluded, the expanded Choice Plan is precisely that sort of permissible program.

First, the Plan provides eligible parents with a neutral benefit—the ability to select the best possible educational opportunity for their children. Pet. App. 26a; *see also Davis v. Grover*, 166 Wis. 2d 501, 532, 480 N.W.2d 460, 471 (1992). In conjunction with other existing programs, the expanded Choice Plan gives eligible MPS parents the choice to send their children to "a neighborhood public school, a different public school within the district, a specialized public school, a private nonsectarian school, or a private sectarian school." Pet. App. 26a & n.16. *See also Agostini*, 117 S. Ct. at 2013 ("aid is provided to students at whatever school they choose to attend"). The Plan thus "creates no financial incentive for parents to choose a sectarian school." *Zobrest*, 509 U.S. at 10. Parental eligibility is determined by financial hardship, not religious affiliation. The eligibility of schools likewise is based on religion-neutral factors. By adding sectarian private schools to the battery of options, the recent amendments display the kind of neutrality the Court repeatedly has endorsed. *See, e.g., Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) (excluding sectarian groups from general program "demonstrate[s] not neutrality but hostility toward religion"); *Capitol Square Review & Advisory Bd. v. Pinette*, 513 U.S. 1106 (1995).

Second, while the Plan gives *eligible parents* a direct benefit, any benefit that flows to particular sectarian institutions as a consequence of parental choices is indirect and incidental. As with the programs at issue in *Mueller*, *Witters* and *Zobrest*, not one cent flows from the State to a sectarian school under the Choice Plan except as a result of the necessary and intervening choices of individual parents. Participating parents and students are the "third party standing between the government and the ultimate religious beneficiary," *Rosenberger*, 515 U.S. at 884-86 (Souter, J., dissenting). They, not the State, determine how much money will flow to which private schools.[10]

In sum, the 1995 amendments to the Choice Plan simply add sectarian schools on a neutral basis to the list of educational options available to financially-strapped parents in Milwaukee. That action, far from violating the Establishment Clause, "follows the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Because the expanded Choice Plan bears the hallmarks of neutrality and indirection, the Supreme Court of Wisconsin did not decide an issue in a way that conflicts with this Court's precedents when it ruled that the expanded Plan does not violate the Establishment Clause.

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[10] As is true of their misguided focus on the "pervasively sectarian" nature of the sectarian schools participating in the expanded Choice Plan, *see supra* at n.8, Petitioners' oft-repeated claim that private schools would receive "millions of dollars" under the Plan, *see, e.g.*, Pet. at i, 3, 5, 22, is beside the point. This Court's precedents make clear that sectarian institutions can receive even "very substantial[]" benefits from the State, as long as those benefits are provided on a neutral and indirect basis. *Mueller*, 463 U.S. at 396 n.5. Similarly, although Petitioners point accusatorially to the possibility that Choice Plan payments to private sectarian schools will exceed tuition (but not exceed the *cost* of the education), Petitioners are unable to articulate a theory as to why that would be constitutionally significant.

II. This Case Is a Poor Vehicle for Resolving Whether *Nyquist* Remains "Good Law."

At bottom, Petitioners' argument for certiorari is that the decision below cannot be squared with *Nyquist*. "Seen through the lens of *Nyquist*," they assert, "this is an open-and-shut case on the merits." Pet at 15. Petitioners maintain, therefore, that "it is time for this Court to say clearly whether or not [*Nyquist*] still is good law." *Id.* at 16. *See also id.* at i (presenting question whether *Nyquist* "continue[s] to state the law").

The question of the degree to which *Nyquist* remains a significant precedent is indeed of great academic interest and practical importance. Some of the Court's discussion in *Nyquist* indeed appears in tension with more recent Establishment Clause rulings; and, to the extent that *Nyquist* is in conflict with those later rulings, the State believes that it is a precedent that should be viewed as having been limited to its facts, if not implicitly overruled. *Cf. Agostini*, 117 S. Ct. at 2017 ("Establishment Clause law has 'significantly changed'" in recent years); *id.* at 2010 ("[w]hat has changed . . . is our understanding of the criteria used to assess whether aid to religion has an impermissible effect."). This Court would certainly provide a valuable service by clarifying whether *Nyquist* remains a significant precedent today, given the regularity with which opponents of school choice invoke *Nyquist* (expressly or implicitly) in legislative debates and lawsuits seeking to enjoin school choice laws. And, of course, only this Court has the power to declare that *Nyquist* no longer constitutes "good law." *See id.* at 2017.

But although the State agrees that much would be gained by this Court's resolving the question whether *Nyquist* has indeed been eclipsed by more recent Establishment Clause rulings, this case is a poor vehicle for such resolution. This is so because the Supreme Court of Wisconsin did not dispute that *Nyquist* remains "good law"; instead, the state court simply found the

expanded Choice Plan distinguishable, in relevant respects, from the New York program at issue in *Nyquist*.

That finding was correct, as the two programs differ in numerous and important ways.

First, as the Wisconsin court recognized, "[i]n *Nyquist*, each of the facets of the challenged program directed aid *exclusively to private schools* and their students." Pet. App. 19a n.9 (emphasis added). The expanded Choice Plan, by contrast, "provides a neutral benefit to qualifying parents [of MPS students]," because, "*viewed in its surrounding context*," it "merely adds religious schools to a range of pre-existing educational choices available to MPS children." *Id.* (emphasis added). Invoking its familiarity with the range of educational options available to MPS students, the Court described the relevant context in which the Choice Plan must be considered:

> According to the stipulated facts in this case, the State's system of public per-pupil school financing, in which public funds follow each child, now encompasses a wide range of school choices—mainly public, but some private or religious. Numerous programs have amended the number and type of educational options available to public school students. Qualifying public school students may choose from among the Milwaukee public district schools, magnet schools, charter schools, suburban public schools, trade schools, schools developed for children with exceptional needs, and now sectarian or nonsectarian schools participating in the [expanded Choice Plan].

Id. at 26a n.16.

This distinction is critical, because *Nyquist expressly reserved* the question whether "a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited" would come out differently. *See* 413 U.S. at 782 n.38. As the Wisconsin court

correctly determined, this is just such a case—involving a truly neutral form of public assistance, and thus presenting a question not addressed by *Nyquist*.

Second, and relatedly, the two laws are decidedly different in their goals. At issue in *Nyquist* was a multifaceted school aid program, the purpose of which was unmistakably and avowedly to assist New York's private schools. *See, e.g.*, 413 U.S. at 783 ("the effect of the aid is unmistakably to provide *desired* financial support for nonpublic, sectarian institutions") (emphasis added); *cf. id.* at 756 ("maintenance and repair grants" to private schools in *Nyquist* were designed to remedy a "fiscal crisis in nonpublic education"). (Petitioners are, therefore, mistaken in their contention that the asserted justifications for the New York law "are essentially the same justifications that have been advanced" in support of the expanded Choice Plan, Pet. at 11.) To judge by this Court's repeated references to the goals of the *Nyquist* law, the fact that that law was enacted with the express purpose of aiding private schools (the vast majority of which were sectarian) played a significant role in the Court's conclusion that the law violated the Establishment Clause. By contrast, it is plain from the context in which the expanded Choice Plan was enacted that the design of the Plan is not to help private schools through a "crisis," but rather to improve the educational opportunities available to Milwaukee's poorest and most disadvantaged students.[11]

Third, the targeted nature of the Choice Plan also distinguishes it from the statute struck down in *Nyquist*. The New York scheme provided benefits to low-income and middle-class parents of sectarian school children across the

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[11] Indeed, given that school choice programs use competition to bring about improvements in schools, it is possible that private schools will suffer, not prosper, under the expanded Choice Plan (if the public schools respond more effectively to competition than do the private schools).

state. The Wisconsin Plan, by contrast, provides benefits only to low-income parents in Wisconsin's most troubled school district.

Fourth, the *Nyquist* Court emphasized that the New York statute placed no restrictions on private schools. *See* 413 U.S. at 782-83. The Choice Plan, by contrast, requires that participating schools select students without regard to religious affiliation and permits choice students to opt out of religious activities. *See supra* at 6.

For these and other reasons, the Wisconsin court was correct to conclude that the expanded Choice Plan is distinguishable from the tuition reimbursement program invalidated in *Nyquist*. Because the facts and context of this case are distinguishable from those of *Nyquist*, this case does not present a fitting opportunity for this Court to declare "whether or not [*Nyquist*] still is good law." Rather, this case merely presents yet another opportunity (much like the opportunity presented by *Mueller*, *Witters* and *Zobrest*) for the Court to clarify the degree to which whether certain *dictum* and intimations in *Nyquist* have application outside the specific facts of that case.

That unremarkable opportunity, however, does not appear to be what Petitioners are seeking. Rather, as the Petition makes clear, Petitioners are seeking nothing less than a definitive ruling from this Court as to whether *Nyquist* "still is good law" or instead has been overruled. *See* Pet at 21-22 (asking Court to "reaffirm *Nyquist* now" or "overrule it now"). If that is indeed Petitioners' goal in seeking this Court's review, then the State respectfully suggests that this a far better vehicle for resolving that question would be a case in which a lower court (1) finds that the law being challenged, viewed in context, is *indistinguishable* from the law at issue in *Nyquist*, and (2) declares that although the law appears permissible under the neutrality-and-indirection case law, the court is constrained to follow *Nyquist* and therefore declare the law invalid.

It bears emphasizing that this Court was confronted with this sort of lower court ruling in *Agostini*. *See Agostini*, 117 S. Ct. at 2006 (describing district court's order, which stated "'[t]here may be good reason to conclude that *Aguilar*'s demise is imminent,'" but nonetheless denied Rule 60(b) motion on merits "because *Aguilar*'s demise had 'not yet occurred.'") (citations omitted). In a case where the lower court's decision met that description, the issue of *Nyquist*'s continuing validity would be squarely presented to this Court. Equally important, a ruling by this Court as to the validity of *Nyquist* would, in such circumstances, *necessarily* dictate whether the lower court decision would be upheld or reversed (which cannot be said in this case).

As Petitioners have noted, *see* Pet. at 22 and 21 n.18, the high courts of Arizona, Maine, Ohio and Vermont are presently considering similar challenges to those states' school choice programs.[12] It is possible that one of those courts will issue a ruling along the lines described above—*i.e.*, one that presents the *Nyquist* issue in its pristine form. That possibility (coupled with the current absence of a current lower court conflict on the constitutionality of school choice, *cf.* S. Ct. R. 10(b)) presents an additional reason for this Court to deny the Petition and await a later opportunity to address the constitutionality of school choice programs.[13]

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[12] *See Kotterman v. Killian*, No. CV-97-0412 SA (Ariz. (original action), filed Sept. 29, 1997); *Bagley v. Maine Dep't of Educ.*, No. CV-97-484 (Me. Superior Ct. Apr. 20, 1998), *appeal pending*, No. CUM-98-281 (Me.); *Simmons-Harris v. Goff*, No. 96APE08-982, 1997 WL 217583 (Ohio Ct. App., May 1, 1997), *appeal pending*, No. 97-1117 (Ohio); and *Chittenden Town Sch. Dist. v. Vt. Dep't of Educ.*, No. S0478-96 RcC (Vt. Superior Ct., Rutland Cty., June 27, 1997), *appeal pending*, No. 97-275 (Vt.). The much earlier state cases cited in footnote 12 of the Petition are of little relevance to the issue at hand, as all four predate *Mueller*.

[13] By the same token, if these other state courts follow the lead of the (continued...)

In short, the interesting, and important, issue of the continuing validity of *Nyquist* is one that is not squarely presented in this case, given the Wisconsin court's conclusion that the *Nyquist* law is distinguishable from the expanded Plan. Accordingly, the State respectfully suggests that this Court would benefit by awaiting a ruling by another lower court that more cleanly presents the *Nyquist* issue.[14]

CONCLUSION

The petition for writ of certiorari should be denied.

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September 30, 1998

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[13] (...continued)
Wisconsin court and reject *Nyquist*-based Establishment Clause challenges to the various choice plans, then the need for this Court to "clarify" the status of *Nyquist* in this context will be greatly diminished.

[14] In response to Petitioners' Supplemental Brief in Support of the Petition for Certiorari, filed on September 23, 1998, the State has no objection to this Court's treating the Petition as if it had been filed on September 1, 1998 (rather than the previous day), if this Court deems such treatment necessary to avoid any jurisdictional concerns. In any event, the State does not view the Wisconsin court's September 1 order (or the Motion for Clarification that was dismissed by that order) as affecting the finality or reviewability of the Wisconsin court's June 10 judgment.

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No. 98-376

In the Supreme Court of the United States

OCTOBER TERM, 1997

WARNER JACKSON, ET AL., PETITIONERS,

v.

JOHN T. BENSON, ET AL., RESPONDENTS.

On Petition for Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF FOR MILLER RESPONDENTS AND REPRESENTATIVE ANNETTE "POLLY" WILLIAMS IN OPPOSITION

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QUESTION PRESENTED

Whether the Establishment Clause permits a State to enact an experimental educational program for the benefit of low-income children in its most economically depressed city, under which eligible children are provided up to their per capita share of the state education fund to pay the costs of attending the accredited school of their choice, whether it is public or private, secular or religious.

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Committee for Public Education v. *Nyquist*, 413 U.S. 756 (1973) . . . . . *passim*

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Mueller v. *Allen*, 463 U.S. 388 (1983) . . . . . *passim*

Peter v. *Wedl*, 1998 WL 612747 (8th Cir. Sept. 15, 1998) 23

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) . . . 20

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Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 14, 17, 20, 21, 24

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Anthony S. Bryk et al., CATHOLIC SCHOOLS AND THE COMMON GOOD (1993) 25

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James S. Coleman et al., HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED (1982) 24, 25

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Funk & Wagnalls, NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1987) 3

Charles Glenn, CHOICE OF SCHOOLS IN SIX NATIONS (U.S. Dep't of Educ. 1989) 25

Carol Innerst, *Idiosyncracies of a School Choice Icon*, WASH. TIMES, Sept. 24, 1995, at B3 3

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BRIEF FOR MILLER RESPONDENTS AND REPRESENTATIVE ANNETTE "POLLY" WILLIAMS IN OPPOSITION

The question in this case is whether the Establishment Clause of the First Amendment is a bar to one of the most important experiments in educational reform now underway in the Nation. Under the Milwaukee Parental Choice Program (the "Program" or "MPCP"), some of the poorest urban families in the country are offered the option of attending the accredited school of their choice, whether it is public or private, secular or religious. Their per capita share of the state education fund is made available to pay the cost of attendance. The Wisconsin Supreme Court upheld the constitutionality of the Program. We believe that decision should not be disturbed.

STATEMENT OF THE CASE

A. Factual Background

Respondent Annette "Polly" Williams is a State Representative for the 10th District of Wisconsin, representing inner-city Milwaukee, and was the primary legislative sponsor of the Milwaukee Parental Choice Program. Respondents Marquelle Miller, Cynthia Miller, Angela Gray, Zachary Gray, Shon Richardson, George Richardson, Latrisha Henry, Faye Henry, Reigne Barrett, Valerie Barrett, Candice Williams, Senton Williams, Clintrai Giles, and Sharon Giles (collectively, "Miller respondents") are children and parents of children who reside in Milwaukee and wish to participate in the Program. Respondents were granted leave to intervene as defendants in these consolidated actions.

Because they lack the financial wherewithal to pay for any alternative, the Miller respondents have no choice but to receive their education in the Milwaukee Public Schools ("MPS"), one of the most troubled school systems in the Nation. See generally *Davis* v. *Grover*, 480 N.W.2d 460, 469 (Wis. 1992). During the 1993-94 school year, for instance, dropout rates among

MPS students in grades 9-12 reached 15 percent each year—seven times the rate among students in Wisconsin as a whole. Wis. J.A. 170-174. In fact, only 48 percent of students who enter the Milwaukee Public Schools as freshmen ultimately graduate (*ibid.*), and of those who do finish, some 36 percent squeak by with a "D" average. *Davis*, 480 N.W.2d at 470. This is despite the fact that spending in the Milwaukee Public Schools exceeds $7600 per pupil—well above national averages. Not surprisingly, there is a strong correlation between dropping out of school and future dependence upon public assistance (or worse). As the Wisconsin Supreme Court recently observed, "[h]igh school dropouts comprise 75 percent of the prison population and 80 percent of the families receiving Aid for Families with Dependent Children. Only 55 percent of the male dropouts under age thirty have jobs and only 20 percent have full-time jobs." *Ibid.* In short, "[t]he consequences of school dropouts and inadequate education are shocking." *Ibid.*

These problems are particularly pronounced for members of racial minority groups. For example, while MPS students generally score below the national average on basic skills tests, "minority students score dramatically below the average." *Davis*, 480 N.W.2d at 470. And while MPS students' grade-point average (on a 4.0 scale) generally is 1.60, the average for African-American students is just 1.31. See MILWAUKEE PUBLIC SCHOOLS, INDICATORS OF EDUCATIONAL EFFECTIVENESS (1990). Given that some two-thirds of MPS students are racial minorities, Milwaukee's high dropout rates have a disproportionate racial impact as well. See Wis. J.A. 170-174.

The troubled condition of Milwaukee's public education system was not lost on Wisconsin Democratic Representative Annette "Polly" Williams, a respondent herein whose district includes many of the families that are caught in the embattled Milwaukee Public Schools. Representative Williams came to understand school choice as a tool of "empowerment of low-

income families and specifically black empowerment." See Carol Innerst, *Idiosyncracies of a School Choice Icon*, WASH. TIMES, Sept. 24, 1995, at B3. See also Donald Lambro, *Liberal Embraces Vouchers*, WASH. TIMES, April 2, 1990, at A8. In 1989, with support from Governor Tommy Thompson, Representative Williams—dubbed the "Rosa Parks of School Choice"[1]—introduced legislation entitled the Milwaukee Parental Choice Program. Shortly thereafter, the legislature enacted it.

The original Program permitted up to 1.5 percent of MPS students to use their share of the state education fund to attend any public or private secular[2] school in Milwaukee, provided the school satisfied certain requirements such as compliance with state and federal antidiscrimination law (42 U.S.C. § 2000d), satisfaction of various performance criteria, and submission to financial and performance audits. Pet. App. 5a-6a. In order to qualify for the Program, a student had to be a member of a family whose income did not exceed 1.75 times the federal poverty level, and either to be enrolled in the Milwaukee Public Schools, attending a private school under the Program, or not enrolled in school during the previous year. *Id.* at 5a. Each eligible student received assistance equal to the state aid to which the MPS would have been entitled under state aid

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[1] Innerst, *supra*.

[2] In this brief, we will use the terms "secular" and "religious" rather than the terms "nonsectarian" and "sectarian." The term "sectarian" is typically pejorative, carrying the connotation of "bigoted." Funk & Wagnalls, NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1137 (1987) (defining "sectarian" as "[p]ertaining to a sect; bigoted"). The dictionary notes that both "sect" and "denomination" refer to "an organized body of believers distinct in doctrine or practice," but that "*sect* is an opprobrious and *denomination* an honorable term for the same body." *Ibid.* We believe that neutral terminology is more fitting.

distribution formulae had the student attended a public school. Under the original plan, the State made payments directly to participating schools. *Id.* at 6a.

In *Davis* v. *Grover*, 480 N.W.2d 460 (Wis. 1992), a group of plaintiffs (some of whom are petitioners here) challenged the original Program on various state constitutional theories. The Wisconsin Supreme Court sustained the original Program against all claims.

Low-income parents in the community regarded the original Program as a tremendous success. During the 1994-95 school year, the Program enabled approximately 800 students to attend approximately one dozen secular private schools. By 1995-96, the Program grew to include roughly 1600 pupils attending roughly 17 secular schools. Pet. App. 7a. By the time of the injunction that suspended implementation of the amended Program, some 4000 MPS students had applied to attend private schools under the Program—far more than the number allowed under the Program's original terms, and more than Milwaukee's secular private schools could accommodate.

In response to this groundswell of interest, the legislature extended the Program in 1995 to encompass private religious schools and increased tenfold—to 15 percent—the number of MPS students allowed to participate. Pet. App. 7a.[3] As a result of these changes, "[t]he amended MPCP, in conjunction with existing state educational programs, gives participating parents the choice to send their children to a neighborhood public school, a different public school within the district, a specialized public school, a private nonsectarian school, or a private

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[3] The State also repealed the original Program's limitation that no more than 65 percent of a private school's enrollment consist of MPCP participants. Pet. App. 8a.

sectarian school." *Id.* at 26a.[4] In short, "[t]he amendments to the program greatly expand[ed] not only the number of students who are allowed to participate, but also the number of private schools in the City of Milwaukee which may now accept students in the program." *Id.* at 65a.

When the legislature amended the Program to include religious schools, it also made a number of related changes to reduce the potential for entanglement. For example, the legislature eliminated the special audit and performance evaluation requirements in the original Program. Pet. App. 7a. Consistent with state law prior to enactment of the Program, however, "[p]articipating private schools [remained] subject to performance, reporting, and auditing requirements, as well as to applicable nondiscrimination, health, and safety obligations." *Id.* at 29a-30a.

The legislature also modified the payment mechanism used in the Program. Under the provisions of the original legislation, the State distributed aid directly to participating schools. Following the 1995 amendments, the State cuts a check to the parents (or guardians) of eligible students, who in turn are required to "restrictively endorse the check for the use of the private school." Wis. Stat. § 119.23(4). Moreover, a separate amendment established an "upper limit" on the amount of per-student assistance that the State will provide to each parent. Pet. App. 65a. Whereas state assistance to private schools formerly was tied solely to levels of MPS per-student aid, the State now will pay only the *lesser* of MPS per-student aid or the private school's "operating and debt service cost per pupil that

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[4] As noted by the court below, "[t]he participating private schools must select on a random basis the students attending their schools under the amended program, except that they may give preference to siblings already accepted in the schools" if demand outstrips the number of spaces in the school. Pet. App. 25a.

is related to educational programming." Wis. Stat. § 119.23(4). See Pet. App. 7a-8a.

Finally, the 1995 amendments included an "opt-out" provision that prohibits participating private schools from requiring "a pupil attending the private school under [the Program] to participate in any religious activity if the pupil's parent or guardian submits to the pupil's teacher or the private school's principal a written request that the pupil be exempt from such activities." Wis. Stat. § 119.23(7)(c); see Pet. App. 8a, 25a.

The Miller respondents are economically disadvantaged parents and children who have experienced first hand the difficulties of obtaining an academically and personally satisfying education in the Milwaukee Public Schools. For both religious and nonreligious reasons, they desire to enroll in religious schools under the amended Program. Respondent Cynthia Miller, for example, believes that a religious educational environment will be "more orderly and disciplined" than the environment in her son Marquelle's MPS school. Wis. J.A. 306, ¶ 4. Respondent Valerie Barrett echoes the Millers' concerns, and seeks to enroll her children in religious schools because "public schools, and even nonsectarian private schools, do not provide [her] children with the educational environment" and "moral base" that would best facilitate their "curricul[ar] and academic achievement." *Id.* at 310-311, ¶ 4. The Miller respondents, of course, are but a handful of the many thousands of families who otherwise would have no alternative to the MPS, and who depend on the Milwaukee Parental Choice Program to obtain an education that satisfies their needs and aspirations. As a result of this lawsuit, these families have been kept waiting more than three years for the Program to become a reality.

B. Proceedings Below

In August 1995, shortly after the Program's enactment, petitioners filed these two lawsuits in Wisconsin state court, alleging that the Program violates the Establishment Clause of the United States Constitution as well as various provisions of the Wisconsin Constitution.[5] The trial court consolidated the actions, and two groups of private parties—including the Miller respondents—were granted leave to intervene on the side of the state defendants.

The Wisconsin Supreme Court assumed original jurisdiction over the matter and stayed further proceedings in the trial court. After preliminarily enjoining implementation of the Program, an equally divided court dismissed the suit and lifted the stay on proceedings in the trial court. Three justices held that petitioners failed to demonstrate a constitutional violation under either the Establishment Clause or the Wisconsin Constitution, and three justices voted to invalidate the Program solely on state constitutional grounds. See Pet. App. 190a-191a. No member of the court held that the Program violated the Establishment Clause. *Ibid.*

Upon return to the trial court, the parties filed cross motions for summary judgment. Principally citing Article I, § 18 of the Wisconsin Constitution, Wisconsin's own religion clause, the court granted petitioners' motion for summary judgment and invalidated the amended Program. Pet. App. 188a. Like the three dissenting justices on the Wisconsin

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[5] Petitioners NAACP, et al., filed a subsequent lawsuit, in which they raised the additional claim that the Program violates the equal protection provisions of the Fourteenth Amendment and Wisconsin Constitution. Those claims were rejected by the court below (see Pet. App. 52a-56a) and are not raised in the Petition. Pet. 6 n.2.

Supreme Court, however, the trial court rested its decision on the state constitution. *Ibid.*

Relying solely upon Article I, § 18 of the Wisconsin Constitution, the court of appeals affirmed the trial court's decision. The court rejected the State's argument that federal Establishment Clause jurisprudence controlled its analysis of the Wisconsin Constitution, stating that it is "settled law" that Article I, § 18 "goes significantly further than the First Amendment in its prohibition of state support or benefit for religion." Pet. App. 75a. Citing "recent Wisconsin precedents which more rigorously analyze the religious benefit issue," the court of appeals ultimately "conclu[ded] that the amended program violates Article I, section 18 of the Wisconsin Constitution because it directs the payment of money from the state treasury for the benefit of religious seminaries." *Id.* at 89a, 85a.

The Supreme Court of Wisconsin reversed. The court relied on the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-614 (1971), under which a law violates the Establishment Clause if it lacks a secular purpose, has a primary effect of either advancing or inhibiting religion, or leads to an excessive entanglement of church and state. The court noted that *Lemon* has been subject to criticism, but explained that "[u]ntil a majority of the Supreme Court directly holds otherwise, * * * we continue to apply the *Lemon* test." Pet. App. 14a n.5.

The court had no difficulty concluding that "the purpose of the state legislation is secular in nature." Pet. App. 14a. "The purpose of the program," the court explained, "is to provide low-income parents with an opportunity to have their children educated outside of the embattled Milwaukee Public School system." *Id.* at 14a-15a. "The propriety of providing educational opportunities for children of poor families in the state," the court added, "goes without question." *Id.* at 15a.

Turning to *Lemon*'s second prong—the effects prong—the court derived its analysis from "the cumulative criteria developed over the years and appl[ied] to a wide range of educational assistance programs challenged as violative of the Establishment Clause." Pet. App. 16a. The court carefully traversed this Court's modern establishment decisions, beginning with *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and culminating in *Agostini* v. *Felton*, 117 S. Ct. 1997 (1997), and reasoned that those cases

> establish[] the general principle that state educational assistance programs do not have the primary effect of advancing religion if those programs provide public aid to both sectarian and nonsectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age children.

Pet. App. 25a. "The amended MPCP," the court held, "is precisely such a program." *Ibid.*

First, "eligibility for benefits under the amended MPCP is determined by 'neutral, secular criteria that neither favor nor disfavor religion.'" Pet. App. 25a (citing *Agostini*, 117 S. Ct. at 2014). Program beneficiaries are "selected on a random basis" from among children who "reside in Milwaukee, attend public schools (or private schools in grades K-3) and meet certain income requirements." *Ibid.* Moreover, "beneficiaries are eligible for an equal share of per pupil public aid regardless of the school they choose to attend." *Id.* at 26a. Thus, the court below explained that "[a] student qualifies for benefits under the amended MPCP not because he or she is a Catholic, a Jew, a Moslem, or an atheist; it is because he or she is from a poor family and is a student in the embattled Milwaukee Public Schools." *Id.* at 27a.

Similarly, "[p]articipating private schools are also selected on a religious-neutral basis and may be sectarian or nonsectarian." Pet. App. 25a. In short, the court held, because students and their families may choose from "a wide range of school choices—mainly public, but some private or religious" (*id.* at 26a n.16), the Program "provides a neutral benefit to beneficiaries selected on religious-neutral criteria" and "neither leads to 'religious indoctrination' nor 'creates [a] financial incentive for students to undertake sectarian education.'" *Id.* at 27a (citations omitted).

Second, the court explained that "[a]ny aid provided under the amended MPCP that ultimately flows to sectarian private schools * * * does so 'only as a result of genuinely independent and private choices of aid recipients.'" Pet. App. 27a (quoting *Witters* v. *Washington Dep't of Servs.*, 474 U.S. 481, 487 (1986)). The court rejected the argument that the Program was invalid merely because "the State sends the checks directly to the participating private school and the parents must restrictively endorse the checks to the private schools." *Id.* at 28a. The important point, the court held, is that "[a]s with the programs in *Mueller* and *Witters*, not one cent flows from the State to a sectarian private school under the amended MPCP except as a result of the necessary and intervening choices of individual parents." *Ibid.* In this regard, the court observed that the Program "places on equal footing options of public and private school choice, and vests power in the hands of parents to choose where to direct the funds allocated for their children's benefit." *Ibid.*

The court considered and rejected petitioners' argument that *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), requires invalidation of the Program under *Lemon*'s second prong. Pet. App. 18a-19a & n.9. The court explained that there are "significant distinctions" between the amended

Program and the program invalidated in *Nyquist*. *Id.* at 19a n.9. Most importantly, the court stated (*ibid.*):

> In *Nyquist*, each of the facets of the challenged program directed aid exclusively to private schools and their students. The MPCP, in contrast, provides a neutral benefit to qualifying parents of school-age children in Milwaukee Public Schools. Unlike the program in *Nyquist*, the only financially-qualified Milwaukee students excluded from participation in the amended MPCP are those in the fourth grade or higher who are already attending private schools. The amended MPCP, viewed in its surrounding context, merely adds religious schools to a range of pre-existing educational choices available to MPS children. This seminal fact takes the amended MPCP out of the *Nyquist* construct and places it within the framework of neutral education assistance programs.

Finally, the court concluded that the Program "will not create an excessive entanglement between the State and religion." Pet. App. 29a. The court noted that the Program's performance, reporting, and auditing requirements, as well as applicable nondiscrimination, health, and safety obligations, "already exist" under prior law and "do not create excessive entanglement merely because they are part of the amended MPCP's requirements." *Id.* at 29a-30a. The court went on to conclude that "[t]he program does not involve the State in any way with the schools' governance, curriculum, or day-to-day affairs." *Id.* at 30a. Thus, the "'[r]outine regulatory interaction'" required by the Program does not entail "the authority to impose a 'comprehensive, discriminating, and continuing state surveillance' over the participating sectarian private schools" or even "approach the level of constitutionally impermissible involvement." *Id.* at 29a, 30a (citations omitted).

Because the court concluded that the Program did not violate the Establishment Clause, it was required to consider petitioners' state constitutional challenges. The court rejected those challenges as well, with two justices dissenting and adopting by reference the court of appeals' analysis as their own. Pet. App. 58a. No court or judge during the entire course of this litigation has reached the conclusion that the Program violates the Establishment Clause of the First Amendment.[6]

REASONS FOR DENYING THE PETITION

The petition for certiorari rests almost entirely on the claim that the decision below is in "direct and irreconcilable conflict" with *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973). Pet. 10, 11, 13. But the Wisconsin Supreme Court carefully considered *Nyquist* and correctly concluded that it is distinguishable. Pet. App. 18a-19a. Indeed, petitioners' assertion that this case "is on all fours with *Nyquist*" (Pet. 12), and accordingly that "this is an open-and-shut case" (*id.* at 15), is based on a misreading of *Nyquist* and a misunderstanding of the nature of the Milwaukee Parental Choice Program. Perhaps more significantly, if the court below had followed petitioners' mistaken notion of Establishment Clause doctrine, it would have *created* a conflict with a long line of this Court's cases recognizing the legitimacy of government programs that aid religious and secular institutions on a neutral and evenhanded basis through the independent choices of private individuals. And it would have set the Establishment Clause on a collision course with other clauses of the First Amendment, which not only do not command, but positively forbid, discrimination against

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[6] On September 1, 1998, the day after the Petition for Certiorari was filed, the Wisconsin Supreme Court issued an order granting the motion of respondents Parents for School Choice to withdraw a motion for clarification of certain state law issues. We agree with petitioners that this order does not affect this Court's jurisdiction.

individuals or groups on the basis of their religious character or speech.

Petitioners' policy arguments are equally unavailing. Fundamentally, those arguments are based on the assumption that the purpose of the state's education fund is to benefit public *schools*, rather than to educate *children*. The First Amendment was not written to protect the exclusive emoluments of the public school system, which did not even exist at the time of the Framing. The people of Wisconsin are entitled to experiment with the theory that competition and choice will improve the previously dismal performance of schools available to the children of inner-city Milwaukee. If the court below had blocked the Parental Choice experiment in the name of a rigid and outmoded interpretation of the federal Constitution, this case might indeed be certworthy. But the sole consequence of the decision below is to allow one State to engage in a promising experiment in educational reform, for the benefit of some of the neediest children in America, in a manner entirely consistent with the values of pluralism, diversity, and choice that are enshrined in the First Amendment. The Program may well succeed in improving the educational opportunities of these children, in which case other States will probably follow Wisconsin's lead. It may fail, in which case we will have learned from the experience. But there is no reason for this Court to stop the experiment before it has had a fair test.

A. The Wisconsin Supreme Court Correctly Distinguished *Nyquist*

Committee for Public Education v. *Nyquist*, 413 U.S. 756 (1973), involved a small program of tax benefits and tuition grants for the benefit of low-income parents whose children attended nonpublic schools. *Id.* at 765-767. The Court held that this program violated the Establishment Clause. The opinion

contains dicta, ignored or repudiated in later cases,[7] that conflict with the reasoning of the court below. The *holding* in *Nyquist*, however, rested on the fact that the program was targeted exclusively to students attending nonpublic schools. *Id.* at 780-783 & n.38. The Court differentiated between programs in which aid flows to "*all* schoolchildren" and those in which aid is restricted to students who choose to attend private schools, a class predominantly made up of religious schools. *Id.* at 782-783 n.38. See *Mueller* v. *Allen*, 463 U.S. 388, 398 (1983) (emphasis in original) (explaining *Nyquist* on the ground that the tuition grants in *Nyquist* were "provided only to parents of children in *nonpublic* schools").

This shows why petitioners' claim of an irreconcilable conflict with *Nyquist* is unfounded. As petitioners concede, the Milwaukee Parental Choice Program "'provide[s] public aid to

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[7] Language in the *Nyquist* opinion implied that no program of assistance to education may be extended to nonpublic schools "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes." 413 U.S. at 780. That language was needlessly broad for decision of the *Nyquist* case, which involved a program of assistance directly exclusively to private schools. As we explain in detail below, subsequent cases make clear that this restriction does not apply to programs in which the aid is given on the basis of neutral criteria and is made "available only as a result of numerous, private choices of individual parents of school-age children." *Mueller* v. *Allen*, 463 U.S. 388, 399 (1983); see also *Widmar* v. *Vincent*, 454 U.S. 263, 273-275 (1981); *Witters* v. *Washington Dep't of Servs.*, 474 U.S. 481, 488 (1986); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 839 (1995); *Cf. Bowen* v. *Kendrick*, 487 U.S. 589 (1988) (where grants are made on a discretionary basis, grantees must use the funds exclusively for secular purposes).

both sectarian and nonsectarian institutions * * * on the basis of neutral, secular criteria that neither favor nor disfavor religion.'" Pet. 13 (quoting Pet. App. 25a). Under the Program, the state's per capita subsidy for education goes to whatever school the student and her family choose—public, secular private, or religious private—on a wholly neutral basis.[8] If they choose to attend a private school, their per capita subsidy is made available to them to pay for that school; if they choose to attend a public school, their per capita subsidy goes to the MPS. That was not true in *Nyquist*, where the tuition reimbursement program was available only to families with children in nonpublic schools. 413 U.S. at 782-783 n.38.

Petitioners relegate discussion of this crucial distinction to a single footnote. Pet. 13-14 n.10. The footnote reads in its entirety:

> Although, as the Wisconsin Supreme Court noted, the New York voucher program "directed aid exclusively to private schools and their students," App. 19a n.9, the same is true here: the Amended MPCP also provides aid "exclusively to private schools and their students"; indeed, the very point of the Program is to enable low-income students in Milwaukee to enroll in private schools instead of remaining in the Milwaukee Public Schools.

Petitioners' description of the Milwaukee Program is flatly incorrect. In truth, as a result of the 1995 amendments,

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[8] Moreover, the Program must be viewed in context, as one of a number of provisions of Wisconsin education law that "give[] participating parents the choice to send their children to a neighborhood public school, a different public school within the district, a specialized public school, a private nonsectarian school, or a private sectarian school." Pet. App. 26a.

Wisconsin now directs its state aid neutrally to all eligible students attending accredited schools in Milwaukee, without discriminating one way or the other. The "very point" of the Program was not merely "to enable low-income students in Milwaukee to enroll in private schools" (Pet. 14 n.10); it was *to give them a choice*.

Petitioners do not explain their reasoning. But it must be based on timing. If, when the State first started to subsidize education sometime in the last century, it had enacted a program that allocated aid to accredited schools of the students' choice, identical to the Milwaukee Parental Choice Program, petitioners could never contend the benefits were "directed exclusively" to private schools. The fact that the Wisconsin system of educational finance was enacted in two steps—first exclusively to public schools and later to students at all accredited schools—cannot logically make a difference.

In sum, to the extent that the petition relies on a supposed conflict between the decision of the Wisconsin Supreme Court and this Court's *Nyquist* decision, it has failed to provide a reason for the Court to grant certiorari.

B. The Decision Below Is Consistent With This Court's Precedents Upholding Programs That Are Neutral And Indirect

Moreover, as the court below recognized (Pet. App. 19a), *Nyquist* cannot be read in isolation from other cases setting forth this Court's establishment jurisprudence. This is particularly true where, as here, the Court's decisions have evolved over time, both as to general doctrine and as to specific results. See *Agostini* v. *Felton*, 117 S. Ct. 1997 (1997) (holding that some school aid precedents had been undermined by later decisions). The Wisconsin Supreme Court properly considered precedents rendered after *Nyquist* and correctly concluded that they supported the constitutionality of the Program. In reaching that

conclusion, the court relied principally on *Mueller* v. *Allen*, 463 U.S. 388 (1983); *Witters* v. *Washington Dep't of Servs.*, 474 U.S. 481 (1986); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); and *Agostini*, *supra*. See Pet. App. 19a-28a. The court's analysis of those precedents cannot be faulted. As the late Justice Brennan stated, summarizing modern Establishment Clause doctrine, when a "subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause." *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 14-15 (1989) (plurality opinion).

Perhaps the clearest precedent in support of the decision below is *Witters*. In *Witters*, the Court unanimously held that public funds could be used to pay the tuition of a student at a Bible college for training for the ministry, pursuant to a program of vocational assistance for the blind. Justice Marshall's opinion for the Court identified three aspects of the program as "central to our inquiry" (474 U.S. at 487), and these factors still stand as this Court's most pertinent statement of the meaning of the Establishment Clause in this context.

First, Justice Marshall noted that funding goes to the recipient institution only through the choice of the individual student. "Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U.S. at 487. Second, he noted that "Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted,' and is in no way skewed towards religion." *Id.* at 487-488 (quoting *Nyquist*, 413 U.S. at 782-783 n.38). Third, he stressed that the Washington program "creates

no financial incentive for students to undertake sectarian education." *Id.* at 488. Their benefits are neither "greater [n]or broader" if they "apply their aid to religious education" than if they choose to attend educational programs at public or other secular institutions. *Ibid.* "[T]he fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State." *Ibid.*

With reference to these factors, the present case is on all fours with *Witters*. Petitioners concede that any aid provided under the Wisconsin program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of parents in Milwaukee. Pet. 13. Moreover, the Program makes aid available without regard to the religious-nonreligious, or public-nonpublic nature of the school chosen by the families involved. See *ibid.* (quoting App. 25a; ellipses in original) (the Program "'provide[s] public aid to both sectarian and nonsectarian institutions * * * on the basis of neutral, secular criteria that neither favor nor disfavor religion'"). Finally, the Milwaukee Parental Choice Program, like the vocational assistance program in *Witters*, "creates no financial incentive for students to undertake sectarian education." 474 U.S. at 488. The state aid that is allocated for the benefit of each child eligible to participate in the Program is neither "greater [n]or broader" if students "apply their aid to religious education" than if they attend a public school or a private secular school. *Ibid.* Whatever accredited school they attend, the state will pay their equal per-student share.[9] As Justice Marshall concluded in *Witters*, "the fact that aid goes to

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[9] Under some circumstances (where the cost of nonpublic education is less than the per-student allotment), students attending nonpublic schools will receive less aid than their public school counterparts. Under no circumstances may they receive more.

individuals means that the decision to support religious education is made by the individual, not by the State." *Ibid.*

Justice Marshall also stated that "nothing in the record indicates that * * * any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education," noting that Mr. Witters was apparently the only recipient of aid under the program who used his aid for religious education. 474 U.S. at 488. As Justice Powell pointed out in his concurrence, however, reliance on this factor was inconsistent with *Mueller* v. *Allen*, 463 U.S. 388 (1983). 474 U.S. at 490-491 & n.3 (Powell, J., joined by Burger, C.J., and Rehnquist, J.). Five Justices agreed with Justice Powell on this point. See *id.* at 490 (White, J., concurring); *id.* at 493 (O'Connor, J., concurring).

In any event, this Court has recently repudiated the suggestion that "the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." *Agostini*, 117 S. Ct. at 2013. The relative number of students choosing religious and secular education under the Wisconsin program, which petitioners stress (Pet. 3-4), is therefore irrelevant. Nevertheless, we would note that, under the Program, well over 85 percent of state education funds in Milwaukee will go to nonreligious schools, since only 15 percent of the students are permitted to use their share of the educational fund to attend nonpublic schools, and a significant portion of them will choose secular schools.

Thus, if the Court below had heeded petitioners' legal argument and had struck down the Milwaukee Parental Choice Program in order to avoid a spurious conflict with *Nyquist*, it would have created a true conflict with *Witters*.

In its most recent decision regarding public aid to education, this Court articulated "three primary criteria we currently use to evaluate whether government aid has the effect

of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Agostini*, 117 S. Ct. at 2016. It is telling that petitioners do not even refer to these three criteria, preferring to cite inapposite cases more than 20 years old. See Pet. 14 n.11. Under these criteria, there can be little doubt that the court below was correct in upholding the Wisconsin program. Since no governmental employees are engaged in providing education under the Program (outside of the public schools), there is no danger of "governmental indoctrination." Any "indoctrination" (*i.e.*, education in the moral and religious traditions of the family) is the result of a constitutionally protected parental choice of private education. See *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). The Program does not define its recipients by reference to religion. The criteria for participation are entirely neutral and objective, based on income, and students attending all accredited schools are eligible without reference to the religious or secular character of the school. Finally, petitioners do not appear to claim that the Program entails excessive entanglement. No new regulatory requirements are imposed on the school, beyond those already applicable under prior law. See Pet. App. 29a-30a.

Again, if the Court below had heeded petitioners' legal argument and had struck down the Parental Choice Program in order to avoid a spurious conflict with *Nyquist*, it would have created a true conflict with this Court's most recent articulation of applicable constitutional standards in *Agostini*.

For similar reasons, petitioners' position would create conflicts with other controlling precedents: *Mueller*, *supra* (upholding a tax credit that could be used for educational expenses, including tuition for nonpublic schools); *Zobrest*, 509 U.S. at 8 (upholding provision of sign language interpreter for student attending a religious school, on the ground that

"government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit"); *Rosenberger*, *supra* (upholding grant of student activity funds to religious student groups on a neutral basis).[10]

It is revealing that petitioners' only claim of conflict with lower courts (Pet. 15 & n.12) is based on four state supreme court decisions from 1955, 1973, and 1974, long before *Mueller*, *Witters*, *Zobrest*, *Rosenberger*, and *Agostini* clarified the law. This serves to confirm that the position taken by petitioners is an anachronism, unsupported by decisions in the last quarter century.

C. If Adopted, Petitioners' Argument Would Create Needless Conflict Between The Establishment Clause And Other Parts Of The First Amendment

A further reason to reject petitioners' construction of the Establishment Clause is that it would compel discrimination against students on the basis of the religious teaching at the school of their choice. According to petitioners, the state may not defray the cost of an education (however effective it may be in objective educational terms) unless there is an "effective means of guaranteeing that the state aid derived from public

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[10] Petitioners suggest that the Parental Choice Program closely resembles the Community Education Program held unconstitutional in the portion of *School District of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985), not overruled in *Agostini*. Pet. 18-19. But in that program, the nature, extent, and distribution of the aid was determined by the Director of the program, a public official—not by the independent choices of students and their families. 473 U.S. at 377. The Community Education Program thus was neither indirect nor necessarily neutral—the two key features of the Milwaukee Parental Choice Program for constitutional purposes.

funds w[ould] be used exclusively for secular, neutral, and nonideological purposes." Pet. 12 (quoting *Nyquist*, 413 U.S. at 780). In practical terms, this means that the state must discriminate against otherwise eligible schools on the basis of the religious content of their teaching.

Petitioners' position is at odds with the fundamental logic of the Free Exercise Clause, which prohibits discrimination on the basis of religion. *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) ("[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs"); *Employment Division* v. *Smith*, 494 U.S. 872, 877 (1990) (under the Free Exercise Clause, the government may not "impose special disabilities on the basis of religious views or religious status"); *Jimmy Swaggart Ministries* v. *Board of Equalization*, 493 U.S. 378, 390 (1990) (to "single out" religious activity "for special and burdensome treatment" would violate the Free Exercise Clause); *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring) (the Free Exercise Clause "protect[s] religious observers against unequal treatment"). To deny an otherwise neutral and generally available benefit to an individual on the basis of her exercise of religion is presumptively unconstitutional—the equivalent of imposing a fine for engaging in the religious practice. See *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963). The course proposed by petitioners thus raises serious risks of creating a constitutional problem where none now exists.

To make matters worse, petitioners' position would also create serious constitutional doubts under the Free Speech Clause. The religious activity that takes place in religious schools is, after all, speech. Teaching is speech. And the government may not exclude individuals or groups from the benefits extended to similarly situated persons on the basis of

the religious viewpoint of their speech. *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995); *Lamb's Chapel* v. *Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Widmar* v. *Vincent*, 454 U.S. 263 (1981).

In short, petitioners would put the Establishment Clause on a collision course with other provisions of the Constitution. See *Peter* v. *Wedl*, 1998 WL 612747 (8th Cir. Sept. 15, 1998) (holding, under Free Exercise, Free Speech, and Equal Protection Clauses, that the state may not provide assistance to students attending secular private schools while refusing to provide comparable assistance to students attending religious private schools). That is an especially improbable reading of related provisions of the same Amendment. It makes far more sense to interpret cognate provisions harmoniously and consistently.

The principles espoused by the court below—"neutrality" and "indirection"—are central to such a harmonious interpretation. If the state dispenses benefits for a secular purpose, on the basis of neutral and objective criteria, then it cannot be said that the government favors, endorses, or induces religious choices. And if the aid flows to religious institutions only as a result of numerous choices made by individuals, then any religious effect cannot be attributed to the government. *Cf. Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974) (holding that a private party's "exercise of the choice allowed by state law" does not constitute state action "where the initiative comes from it and not from the state"). As the Court explained in *Witters*, "the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State." 474 U.S. at 488. By contrast, the doctrinal gymnastics petitioners employ as they bob and weave among this Court's precedents bear no relation to any discernible purpose of the First Amendment. If the Establishment Clause is interpreted—as it was in *Everson*, *Allen*,

Walz, *Widmar*, *Mueller*, *Witters*, *Zobrest*, *Lamb's Chapel*, and *Rosenberger*—to permit neutral treatment of religious choices through indirect aid to religious institutions, then conflicts with the Free Exercise Clause and the Free Speech Clause are minimized.

D. Petitioners' Argument That Certiorari Should Be Granted To Advance The "National Policy Debate" Should Be Rejected

Petitioners repeatedly sound the refrain that the Parental Choice Program will "divert millions of tax dollars from the Milwaukee Public Schools" to be used for private schools. Pet. 3, 5, 20. This choice of words is highly revealing. It suggests that petitioners view the state education fund as serving the purpose of subsidizing a particular set of *schools*. We believe, and the Wisconsin legislature evidently agreed, that the purpose of the education fund is to provide the best possible *education* for the *children* of the State. If state taxpayers' money is being used for that purpose, it is not being "diverted."

Educational choice raises legitimate issues of educational policy, about which reasonable people disagree. The premise of the Wisconsin program is that, when the educational system has manifestly failed the children, as it has in Milwaukee, it is time to explore alternatives. Supporters of educational choice believe that the past policy, in which the public school establishment was given a protected monopoly over the education fund, has stifled innovation and created a sclerotic, unresponsive, inefficient bureaucracy—with poor, minority, and inner-city children bearing the brunt of the system's inadequacies. See generally John E. Chubb & Terry M. Moe, POLITICS, MARKETS, AND AMERICA'S SCHOOLS (Brooking Inst. 1990); James S. Coleman et al., HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED (1982). Researchers predict that introducing choice and competition will enable parents to obtain a superior education for their children

and stimulate improvements for the entire system. See Chubb & Moe, *supra*, at 185-229; Coleman, *supra*, at 122-178; James S. Coleman & Thomas Hoffer, PUBLIC AND PRIVATE HIGH SCHOOLS: THE IMPACT OF COMMUNITIES 57-96 (1987); Anthony S. Bryk et al., CATHOLIC SCHOOLS AND THE COMMON GOOD 55-78 (1993) (summarizing research data).[11]

To be sure, the argument for educational choice is at present primarily predictive and theoretical, since there has never been a comprehensive program of educational choice in any city in America.[12] But as the Wisconsin legislature recognized, it is a promising source of hope for genuine reform of elementary and secondary education in Milwaukee. The great virtue of the decision below is that it will allow the theory to be tested under the real-world conditions of inner-city Milwaukee, where educational reform is desperately needed. *Cf. Washington* v. *Glucksberg*, 117 S. Ct. 2258, 2292-2293 (1997) (Souter, J., concurring) (explaining why courts should permit legislative experimentation when dealing with "emerging" issues where effects and consequences are "currently unknown").

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[11] Even in the short run, children in public schools (as well as those who choose to attend private schools) will benefit economically from the Milwaukee Parental Choice Program. Since the per-student amount of state aid is less than 40% of the average total cost of educating a student in the Milwaukee Public Schools, *Davis* v. *Grover*, 480 N.W.2d 460, 476-477 (Wis. 1992), the immediate effect of the Program is that the remaining 60%—now over $4500 per student per year—will have the effect of increasing the per-pupil spending in the public schools.

[12] Educational choice is the norm in other western democracies. See Charles Glenn, CHOICE OF SCHOOLS IN SIX NATIONS (U.S. Dep't of Educ. 1989) (describing the systems in France, the Netherlands, Belgium, Britain, Canada, and West Germany).

Petitioners worry that educational choice plans will "spread like wildfire." Pet. 20 (citation omitted). Much as we applaud the sentiment, we think the prediction is premature. If the Milwaukee experiment works, other States will no doubt follow. But the Milwaukee experiment may not work, in which case we will have learned from the experience. Either way, there is no proper basis for judicial intervention. Petitioners should save their policy arguments for the legislature. This Court should not endorse their effort to put an end to the experiment—nationwide—before it is given a fair chance to succeed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WARNER JACKSON, *et al.*, *Petitioners,*

v.

JOHN T. BENSON, *et al.*, *Respondents.*

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, *et al.*, *Petitioners,*

v.

JOHN T. BENSON, *et al.*, *Respondents.*

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*, *Petitioners,*

v.

JOHN T. BENSON, *Respondent.*

On Petition for Writ of Certiorari to the Supreme Court of Wisconsin

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BRIEF *AMICUS CURIAE* OF THE ANTI-DEFAMATION LEAGUE IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*[1]

The Anti-Defamation League (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudices in the United States. The ADL has always adhered to the principle that these goals, and indeed the general stability of our democracy, are best served through the separation of Church and State and the preservation of the fundamental right to free exercise of religion. Over the last several decades, in an effort to further this value, the ADL has participated in almost every Establishment Clause case to reach this Court.

ARGUMENT

I. THE WISCONSIN SUPREME COURT'S DECISION IN *JACKSON v. BENSON* MANIFESTLY VIOLATES THE ESTABLISHMENT CLAUSE

The principles embodied in the Establishment Clause are far too important to be subjected to a referendum on the quality of our inner city public schools. These principles cannot and should not be compromised, notwithstanding the difficult problems state and local governments admittedly must confront regarding the state of public education in our urban communities. The

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amicus curiae* and their counsel, made a contribution to the preparation and submission of this brief.

amended Milwaukee school voucher program pays for a religious education. It puts the state in the position of financing religious indoctrination. It directly entangles Church and State. It is unconstitutional.

The Wisconsin Supreme Court, in *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), flagrantly contradicted settled Establishment Clause jurisprudence when it upheld the amended Milwaukee school voucher program. This Court has long held that public funds may not be used for the support of religious institutions, and expressly applied this rule to state funding of pervasively sectarian schools in *Committee for Public Educ. v. Nyquist*, 413 U.S. 756 (1973). The doctrine of separation of Church and State dates back to the founding of this nation and the creation of the Establishment Clause; this Madisonian doctrine which spurns public funding of religious institutions is recorded in *Memorial Remonstrance Against Religious Assessments*, reprinted as an Appendix to *Everson v. Board of Educ.*, 330 U.S. 1, 63-72 (1947). The Court has applied this principle more formulaically through the announcement of the pervasively sectarian test in *Hunt v. McNair*, 413 U.S. 734, 743 (1973): "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission. . . ."

Curiously, the Wisconsin Supreme Court never questioned that the religious schools which qualify for participation under the amended Milwaukee school voucher experiment are pervasively sectarian. That the religious mission of some of the sectarian schools

participating in Milwaukee's amended voucher program is both overt and intimately intertwined with the teaching of secular subjects is clear from the materials these schools have provided. Some representative mission statements are as follows:

> "In keeping with the purpose of our school, our curriculum is taught in the setting of God's Word. Religion is not only taught as a subject, but our teachers have been trained to integrate God's Word across the curriculum. . . . Our curriculum offerings place Christ as the focal point of all study."
>
> "The message of Jesus is taught in religion classes and other curricular areas. . . . Because of the nature of a Catholic school, religion is taught daily as part of the curriculum. Catholic values are also incorporated into all other aspects of the curriculum."
>
> "The Bible forms the core and center upon which all instruction is based. . . . All subjects are taught by a Christian teacher in the light of God's Word, emphasizing God's love for all men through Jesus."

Jackson v. Benson, 570 N.W.2d 407, 413 (Wis. App. 1997), *rev'd*, 578 N.W.2d 602 (Wis. 1998).

Given the uncanny similarities between this case and this Court's decision in *Nyquist*, *amicus curiae* finds the Wisconsin Supreme Court's decision wholly indefensible. *Nyquist* involved a tuition-reimbursement plan for low income parents whose children attended private secular and sectarian schools. *Nyquist*, 413 U.S. at 780. This Court declared the New York statute at issue in *Nyquist* unconstitutional precisely because the plan

provided no guarantee that public funds would be used exclusively for "secular" and "nonideological" purposes. *Id.* The amended Milwaukee school voucher program similarly provides no guarantee that public funds will not be used for pervasively sectarian purposes. The ability of parents to use vouchers at non-sectarian schools simply does not relieve the state of responsibility for constitutional encroachment when state funds are used by, and at the discretion of, the religious institutions which comprise the overwhelming majority of participating schools. *Nyquist* also rejected the notion that transferring public funds to pervasively sectarian institutions via the parents of participating children rendered the otherwise unconstitutional plans constitutional.

In addition, since the Wisconsin Supreme Court in *Jackson* misapplied the three-prong Establishment Clause compliance test first articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), it is necessary to remedy that critical error. The court failed to present any meaningful analysis of statutory purpose, beyond the summary statement that a secular purpose is presumed under *Mueller v. Allen,* 463 U.S. 388, 394 (1983). *Amicus curiae* submits that any suggestion that the designation "educational choice" magically transforms the amended Milwaukee school voucher program into an educationally neutral program is a breach of constitutional integrity. Axiomatically, it follows then, teachers can lead sectarian prayers in the classroom as long as they designate the exercise as a "classroom choice." The *Jackson* court also failed to consider the purpose of the amended Milwaukee school voucher program independent of the purpose of the original Mil-

waukee voucher program, which reveals statutory modifications made for the sole purpose of advancing religion and strengthening religious institutions.

The Wisconsin Supreme Court, in its analysis of the effects of the amended Milwaukee school voucher program under *Lemon*'s second prong, focused exclusively on the "neutrality" of the statute and failed to consider the coercion test and endorsement test this Court has previously employed to assess the effects of a statute or activity. *See Lee v. Weisman*, 505 U.S. 577 (1992); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). While neutrality is unquestionably a facet of Establishment Clause analysis, it has never been held out as the sole controlling test for determining whether a statute has the effect of advancing religion under *Lemon*. Over the past decade, this Court has introduced additional tests which should have been applied to the amended Milwaukee school voucher program. The Wisconsin Supreme Court in *Jackson*, therefore, erred in relying solely on the neutrality test. Had the Wisconsin Supreme Court applied systematically the full range of tests furnished by this Court to ensure compliance with the effects prong of *Lemon*, it would have concluded that the amended Milwaukee school voucher program has the effect of advancing religion.

Clearly, there is dissension and a lack of clarity among the federal circuits and state courts regarding current Establishment Clause jurisprudence. The Fifth Circuit, in *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), applied the three prongs of *Lemon*, and also applied the coercion and endorsement tests independent of its *Lemon* analysis. More recently,

however, the Ninth Circuit, in *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998), failed to consider either the neutrality or endorsement tests, but did apply the coercion test independent of the *Lemon* test. In the aggregate, these decisions significantly conflict with the analysis used by the Wisconsin Supreme Court, which strategically incorporated the neutrality test into its application of *Lemon*'s effects prong, but disregarded both the coercion and endorsement tests announced by this Court. For the sake of Establishment Clause jurisprudential consistency, courts cannot be allowed to freely pick and choose which precedents and doctrines they wish to apply in a given case.

In addition, the "entitlements" furnished by the amended Milwaukee school voucher program provide a financial incentive for existing sectarian schools to expand, and for new schools to open, in reliance upon the public for funding. This Court specifically discussed this potential for expansion in *Nyquist*:

> . . . [A]id programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. . . . In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration.

Nyquist, 413 U.S. at 797-98. If this Court does not act in this case, the inevitable entrenchment and escalation of the amended school voucher program in Milwaukee, and other programs nationwide, threatens to entangle the government with religious institutions well beyond constitutionally permissible bounds. To the extent that such entanglement is permitted, it will, as a practical

matter, be virtually impossible to modify or restrict the funding of pervasively sectarian schools without making budgetary decisions on a sectarian basis.

The Establishment Clause confusion, further exacerbated by the Wisconsin Supreme Court in *Jackson* and evidenced by disparate goal-oriented analyses in lower court decisions, is in immediate need of redress. In the absence of this Court's immediate action, the erosion of the Establishment Clause will likely be irreparable.

II. PUBLIC SCHOOLS ARE THE CORNERSTONE OF A DEMOCRACY

Permitting the amended Milwaukee school voucher experiment to continue not only abridges the Establishment Clause, but also undermines the deep-rooted societal value of public education and permits state and local governments to delegate away their responsibility to educate the youth of this country and to inculcate them with community values. As the Court eloquently acknowledged over forty years ago:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. . . .

Brown v. Board of Educ., 347 U.S. 483, 493 (1954). The proponents of the amended Milwaukee voucher experiment ignore not only the special status public schools have as shapers of values, ideas and knowledge which are central to the notion of community and the ability to exercise fundamental constitutional rights, but also disregard almost half a century of jurisprudence recognizing this critical link between public education and the common good of our democracy.[2]

Public education is fundamental to a democratic society, for it has responsibility for transmitting the very values and skills which sustain it. Commenting on public education in general, this Court has noted that "[t]he classroom is peculiarly the 'marketplace of ideas.'" *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Certain lessons cannot be taught in an environment filtered to exclude the vast majority of the populace. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 315 (1986) (Stevens, J., dissenting) ("[O]ne of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous

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[2] *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) (public education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation"); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (education is necessary to "prepare citizens to participate effectively and intelligently in our open political system. . ."); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (public education is a "most vital civil institution for the preservation of a democratic system of government"); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("The American people have always regarded education and acquisition of knowledge as matters of supreme importance. . . .").

'melting pot' do not identify essential differences among the human beings that inhabit our land."). Only in and through public schools do children learn how to live together in a pluralistic and often difficult world. *Wisconsin v. Yoder*, 406 U.S. 205, 221 ("education prepares individuals to be self-reliant and self-sufficient participants in society").

Giving up on public schools by diverting public funds to private schools is not a community solution to a community problem. Government, acting in the interest of the public good, must act in a supportive way toward an institution as important as public schools rather than abandon the citizens and the public infrastructure of our urban communities. Whatever the solutions are to the problems of our public schools, they are to be found not in so-called private school "choice," but in unwavering support for both the public schools in our troubled urban communities and the parents and children who look to those schools to prepare them to realize some measure of the American dream.

Providing public schools ranks at the very apex of the functions of a State. *Yoder*, 406 U.S. at 213. For this reason, virtually every state provides a mandate for public education for its children in its constitution. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 111-112 (1973) (Marshall, J., dissenting) ("No other state function is so uniformly recognized as an essential element of our society's well-being."). Removing children from the public school mix and diverting them to private—let alone religious—institutions compromises this objective. The plan articulated in Milwaukee's original voucher experiment reflects a shift of the

state's responsibility for providing a public education to the private arena. The amended school voucher program would allow Wisconsin to abdicate further its fundamental role of providing its children a public education. Quite simply, paying for private education—which allows governments to escape all but their financial responsibility—does not achieve the same public good as providing a public education. Respondents fail to acknowledge the central responsibility public schools have in a democratic society. If public schools are troubled, the way to improve them, while promoting the public good, is to fix them, not to abandon them.

Moreover, diverting public funds to private schools will not improve the overall education of our children. It is true that the public schools in Milwaukee, as well as those in many of our other major cities, do not always achieve perfection in their goal of teaching our children. In contrast, the state-mandated data collected on the amended Milwaukee school voucher experiment shows mixed results at best. The Wisconsin Department of Public Instruction commissioned Professor John F. Witte of the University of Wisconsin-Madison Department of Political Science to evaluate the voucher experiment.

In his reports, Witte and his researchers conclude that students participating in the original Milwaukee school voucher program did not perform better than their counterparts attending public schools. Witte reported that "[o]utcomes after five years of the Choice Program remain mixed." John F. Witte, et al., *Fifth-Year Report Milwaukee Parental Choice Program*, Executive Summary, Dept. Political Science and The

Robert M. La Follette Institute of Public Affairs at the Univ. of Wis.–Madison (Dec. 1995). Specifically, "reading scores increased in the first year, fell substantially in the second year, and have remained approximately the same in the next three years. . . . In math, choice students were essentially the same in the first two years, recorded a significant increase in the third year, and then significantly declined this last year." *Id. See also* John F. Witte & Christopher A. Thorn, *Fourth-Year Report Milwaukee Parental Choice Program,* Executive Summary, Dept. of Political Science and The Robert M. La Follette Institute of Public Affairs at the Univ. of Wis.–Madison (Dec. 1994). In contrast, the success of other states' public education reforms shows that commitment to improving educational achievement can be attained without sacrificing public school systems. As United States Secretary of Education, Richard W. Riley, has stated, "Vouchers are a pessimist's response to the problems facing some of our public schools. The way to improve schools is not to give up on them, but to raise academic standards, restore discipline, promote more parental involvement and get computers into the classroom." Richard W. Riley, *Address at Families First Forum* (July 24, 1996) (transcript available in U.S. Senate Web Page (http://www.senate.gov/~dpc/families_first/riley.html)).

At a time when parents and educators are demanding increased achievement and accountability in public education, it is no surprise that some state and local governments uncomfortable with tackling these challenges are starting to turn to privatization as a panacea. The amended Milwaukee school voucher program provides the Wisconsin government a means to escape

a difficult responsibility by paying for public school students to attend private schools. The Wisconsin Legislature's 1995 amendments to the voucher experiment cleverly eliminate the evidence of non-achievement and escape accountability by ending all funding for data collection and evaluations, effectively eradicating critical study of the voucher experiment. *See* 1995 Wis. Legis. Serv. 27, §§ 4007(m), 4008(m).

The amended Milwaukee school voucher program presents questions no less important than under what conditions a democracy can or cannot function. In the final analysis, the issue is how we perceive our collective responsibilities to each other. As has been suggested,

> Education is more important than ever as our nation adapts to tremendous changes in the economy, technology, and even the structure of our society. If providing the best possible education to all children remains something Americans value, then we owe it to ourselves to make sure our public school system is as strong as we can make it. In the end, public schools reflect the needs, desires, and concerns of the public itself—all of us. Our schools will only be as strong, as fair, as equitable, and as well funded as we demand that they be.

School Funding: How much do we value good public education?, Our Children Mag., Nov./Dec. 1996. Unambiguous support for an all-inclusive public school system is an absolute necessity for a free and democratic society.

III. THIS COURT SHOULD SETTLE THE QUESTION NOW

Because this case not only implicates fundamental constitutional principles, but also affects the settled expectations of millions of children, parents, educators and legislators, the Court should consider the issues presented by the Wisconsin Supreme Court's holding in *Jackson* now instead of deferring review to a later date. The constitutionality of voucher programs which remove children from public schools and place them in private institutions, including religious schools, is ripe for review. The possibility that the education of our nation's children may be compromised warrants immediate action in and of itself. Additionally, deferment will be construed as tacit approval of Milwaukee's amended school voucher program, and numerous other state and local governments will surely follow suit. In short, there will be no more opportune moment to provide an answer to the Establishment Clause questions on which this case hinges.

Amicus curiae recognizes that the public education system in this country often struggles to achieve its educational goals and that many urban systems are undergoing restructuring. Government attempts to ameliorate the existing problems have sparked the current wave of experimentation with alternatives to public schools.[3] The amended Milwaukee school vouch-

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[3] In its decision, the Wisconsin Supreme Court repeatedly noted that the Milwaukee vouchers are "experimental." *Jackson v. Benson*, 578 N.W.2d 602, 625-26 (Wis. 1998). The preliminary results provide no reliable evidence that the Mil-

(continued...)

er program therefore is only one of a series of such programs being considered and implemented throughout the nation, all of which have, or undoubtedly will, face constitutional challenges. *See, e.g., Simmons-Harris v. Goff*, Nos. 96APE08-982, 96APE08-991, 1997 WL 217583 (Ohio Ct. App. May 1, 1997).

State and local governments will view delay by this Court in reviewing the constitutionality of the amended Milwaukee school voucher program as effectively endorsing the abandonment of public school systems. This undoubtedly will result in the exponential growth of voucher programs and a new *status quo* where public education in schools committed to inculcate religious teachings and values is commonplace. Instead of defending the fundamental purpose of public education and focusing on meaningful reform, governments will continue to abdicate that responsibility and divert financial and intellectual resources to the privatization of public schooling, notwithstanding the danger that

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[3] (...continued)
waukee voucher program improves academic achievement. *See, e.g.*, John F. Witte, et al., *Fifth-Year Report Milwaukee Parental Choice Program,* Dept. of Political Science and The Robert M. La Follette Institute of Public Affairs at the Univ. of Wis.–Madison (Dec. 1995); John F. Witte & Christopher A. Thorn, *Fourth-Year Report Milwaukee Parental Choice Program*, Dept. of Political Science and The Robert M. La Follette Institute of Public Affairs at the Univ. of Wis.–Madison (Dec. 1994); John F. Witte, *Reply to Greene, Peterson and Du: "The Effectiveness of School Choice in Milwaukee: A Secondary Analysis of Data from the Program's Evaluation," The Milwaukee Parental Choice Program,* Dept. of Political Science and the Robert La Follette Institute of Public Affairs at the Univ. of Wis.–Madison (Aug. 1996).

such programs may be unconstitutional. This Court's refusal to act now, in other words, will itself be deemed a tacit approval of the abdication of public responsibility to face difficult educational reform issues.

Postponing review will also threaten the stability of basic education provided to millions of schoolchildren. First, with every class of children culled from the public school rolls, the infrastructure of our public school system will erode. The passage of time will only compound the effects of this deterioration and have a devastating impact upon the poorest and most disadvantaged children.

Second, families structure their affairs—such as choosing where to live, where to be employed and how much money to spend on their children's education—in reliance upon existing laws. Postponing a decision on the constitutionality of these voucher programs will disrupt the basic life decisions of millions of people. Given the relatively straightforward constitutional issues presented by this case, the Court ought to address them now. In short, to borrow from Benjamin Franklin, this case presents this Court the opportunity to render an ounce of prevention now rather than a pound of cure later.

CONCLUSION

For the reasons stated, a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WARNER JACKSON, *et al.*, *Petitioners*,

v.

JOHN T. BENSON, *et al.*, *Respondents*.

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, *et al.*, *Petitioners*,

v.

JOHN T. BENSON, *et al.*, *Respondents*.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*, *Petitioners*,

v.

JOHN T. BENSON, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF *AMICUS CURIAE* OF THE NATIONAL COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF *AMICUS CURIAE* OF THE NATIONAL COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The National Committee for Public Education and Religious Liberty ("National PEARL") submits this brief *amicus curiae* in support of the petition for a writ of certiorari filed on behalf of the petitioners, who were plaintiffs in the trial court and respondents in the Wisconsin Supreme Court in three consolidated cases challenging the constitutionality of a Wisconsin school voucher program. This brief is filed with the written consent of all parties, and their letters of consent have been filed with the Court.[1/]

INTEREST OF THE *AMICUS CURIAE*

National PEARL is a diverse coalition of grassroots and national civic, educational, religious, labor and civil rights organizations and individual members that seeks to preserve religious freedom and maintain the separation of church and state in public education. National PEARL believes that public funds should be spent in public schools and that public schools should remain safe havens for all children, regardless of their creed.

The Wisconsin Supreme Court in *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998) (Pet. App. at 1a), misapplied this Court's Establishment Clause jurisprudence, and as a result, upheld a statute providing for direct state funding of religious education. The Wisconsin court's decision is flatly at odds

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[1/] Counsel for the *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

with the basic constitutional principles that National PEARL and its members have fought to uphold. National PEARL urges review and reversal of that decision, to reaffirm the bedrock Establishment Clause prohibition against direct government sponsorship of religious activities.

SUMMARY OF *AMICUS*'S POSITION

The Milwaukee Parental Choice Program as initially established allowed a limited number of Milwaukee Public School students to attend "at no charge, any nonsectarian private school located" in the City of Milwaukee. In 1995, the state legislature removed the requirement that participating private schools be "nonsectarian." Now, under the amended Milwaukee Parental Choice Program ("amended MPCP") at issue in this case, approximately 15,000 Milwaukee students are allowed to attend sectarian private schools at state expense. The state pays these schools the lesser of the per-pupil state aid provided to Milwaukee Public Schools or the schools' "operating and debt service cost per pupil that is related to education programming," Wis. Stat. § 119.23(4), even though tuition at most participating sectarian schools is less than either figure. Once the state funds reach the schools' coffers, they can be used for any purpose at all, including paying their clergy, purchasing religious literature or supporting missionary work.

Twenty-five years ago, this Court rejected a private-school voucher program indistinguishable from the amended MPCP in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), a case litigated by a predecessor of National PEARL. More recently, this Court reaffirmed that "aid to a religious institution unrestricted in its potential uses, if properly attributable to the state, is 'clearly prohibited under the Establishment Clause.'" *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 489

(1986) (citation omitted). This Court has never allowed states to engage in the kind of systematic funding of religious activity that will occur if the Wisconsin court's decision is allowed to stand.

Nonetheless, the Wisconsin Supreme Court held that the amended MPCP did not violate the fundamental Establishment Clause principle that public funds may not be used to finance religious indoctrination for two reasons. First, the court determined that the amended MPCP does not implicate the state in impermissible religious activity because it provides state funds to both sectarian and nonsectarian schools and is thus "neutral" toward religion. (Pet. App. at 25a-26a.) Second, the court held that the amended MPCP did not implicate the state in impermissible religious activity because parents, not the state, make the choice to provide state funds to religious schools. (Pet. App. at 27a-28a.) In so ruling, the Wisconsin court misinterpreted this Court's Establishment Clause jurisprudence and departed dramatically from the precedents that govern both of the points on which its decision rested.

1. In holding that the amended MPCP was "neutral" in the sense that program benefits flowed to both sectarian and nonsectarian schools, the Wisconsin Supreme Court ignored the body of precedent establishing that the mere fact that a statute benefits secular as well as sectarian schools does not establish that it is "neutral" toward religion. The Wisconsin court thus effectively substituted a simple requirement that the law be evenhanded for the more refined analysis this Court has required in order to determine whether a law has "the effect of advancing religion." *Agostini v. Felton*, 117 S. Ct. 1997, 2014 (1997).

2. In holding that the amended MPCP entails an opportunity for parental "choice" that breaks any link between

state dollars and church coffers, the Wisconsin Supreme Court credited a type of sham transaction that this Court has repeatedly rejected, and equally important, misconstrued this Court's approval of aid programs that allow for "genuinely independent and private choices of aid recipients." *Witters*, 474 U.S. at 487.

National PEARL accordingly urges this Court to grant certiorari in order to address the Wisconsin Supreme Court's departure from fundamental Establishment Clause principles, and to clarify these principles. The Wisconsin court candidly acknowledged the difficulties in "distill[ing]" an "underlying theory" to guide its analysis of the amended MPCP, and these same difficulties are likely to mislead other courts that will be required to judge state experiments with "school choice" programs. (Pet. App. at 16a.) This Court should make clear that its recent Establishment Clause decisions have not eliminated the basic constitutional principle that programs that involve the systematic, direct funding of religious activities, like the one this Court addressed in *Nyquist* and like the amended MPCP, violate the Establishment Clause.

ARGUMENT

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH WELL-ESTABLISHED PRECEDENT BECAUSE IT INCORRECTLY INTERPRETED RECENT SUPREME COURT DECISIONS AS ALTERING FUNDAMENTAL ESTABLISHMENT CLAUSE PRINCIPLES

In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), this Court deemed unconstitutional a school voucher program that provided tuition reimbursements for children attending both sectarian and non-sectarian private schools. The *Nyquist* Court reached this result even though

the program was evenhanded in the respect that tuition for both religious and non-religious schools was reimbursed, and even though the religious schools received the state aid only because parents chose to send their children to those schools. The Court held that the program impermissibly advanced religion because it provided no guarantee "that the state aid derived from public funds [would] be used exclusively for secular, neutral, and nonideological purposes," and because channeling the aid through parents was of no constitutional significance. 413 U.S. at 780, 783.

In recent years, this Court's Establishment Clause decisions and dicta have somewhat obscured the constitutional guideposts that led to the *Nyquist* Court's decision. The Wisconsin court, lost in the underbrush that has grown out of a series of cases stretching from *Muller v. Allen*, 463 U.S. 388 (1983), to *Agostini v. Felton*, 117 S. Ct. 1997 (1997), mistakenly believed that the Court had blazed a new, different trail.[2/]

The Wisconsin court thus held that the amended MPCP is constitutional because aid is "'made available to both religious and secular beneficiaries on a non-discriminatory basis'" (Pet. App. at 25a, quoting *Agostini*, 117 S. Ct. at 2014) and because aid flows to sectarian private schools only "as a result of the necessary and intervening choices of individual parents" (Pet. App. at 28a), despite the fact that both characteristics were features of the *Nyquist* scheme.

[2/] The other decisions in the *Muller-Agostini* line of cases upon which the Wisconsin court relied include *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995).

In searching for a path to a decision, the Wisconsin court wrongly focused on selected attributes of other funding programs that the Court has analyzed over the years, and it mistook what were necessary conditions for constitutionality in those case as sufficient for upholding the very different program at issue here. But this Court has never renounced, and indeed has reaffirmed, the fundamental animating principle of its *Nyquist* decision — that the Establishment Clause prohibits states from providing financial support to programs that advance religion.

A. The Wisconsin Court Failed To Grasp That Establishment Clause Neutrality Means Not Merely Evenhandedness As Between Secular And Religious Institutions, But Neutrality With Respect To Advancing Religion.

The Wisconsin Supreme Court's decision reflects a fundamental misunderstanding of the difference between evenhandedness and neutrality in Establishment Clause analysis. As this Court recently explained, "'[e]venhandedness is a necessary but not sufficient condition for an aid program to survive constitutional scrutiny.'" *Agostini*, 117 S. Ct. at 2014 (quoting *id.* at 2025 (Souter, J., dissenting)). In assessing whether a statute conforms to Establishment Clause neutrality principles, the dispositive question is not whether the law treats secular and religious organizations evenhandedly, and is in this sense neutral, but rather, whether the law is neutral in the sense that it does not have "the effect of advancing religion." *Id.* *See also Nyquist*, 413 U.S. at 788 ("'neutrality'" means "neither 'advancing' nor 'inhibiting' religion").

The Wisconsin court clearly misunderstood this basic point when it found that the amended MPCP "satisfies the principle of neutrality" simply because program beneficiaries

and participating schools are selected without regard to religious orientation. (Pet. App. at 26a.)

Evenhandedness, or "formal" neutrality as between secular and sectarian institutions, is a factor in Establishment Clause analysis, but it is not the dispositive factor. *See Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 839-41 (1995); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 227 (1948) (opinion of Frankfurter, J.) (the Establishment Clause creates "a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally"). This Court has repeatedly held that statutes that advance or endorse religion violate Establishment Clause neutrality principles even though they provide benefits to both secular and sectarian groups. *See, e.g.*, *Nyquist*, 413 U.S. at 780 (striking down a law providing reimbursement to students attending both secular and sectarian private schools); *Tilton v. Richardson*, 403 U.S. 673, 676 (1971) (striking down a law allowing construction grants to "all colleges and universities regardless of any affiliation or sponsorship by a religious body"); *Wolman v. Walter*, 433 U.S. 229, 248-51 (1977) (striking down a law allowing Ohio to lend instructional material and equipment to students attending both secular and sectarian private schools).

The Wisconsin court failed to address these decisions because it misunderstood this Court's *Mueller-Agostini* line of cases as equating simple evenhandedness with Establishment Clause neutrality. What the Wisconsin court failed to recognize is that, although evenhandedness was a necessary condition for upholding the programs at issue in those cases, *see Agostini*, 117 S. Ct. at 2014; *Rosenberger*, 515 U.S. at 839; *Zobrest*, 509 U.S. at 10-11; *Witters*, 474 U.S. at 487-88; *Muller*, 463 U.S. at 397-99, in each case this Court also considered whether the programs actually operated in a neutral

manner and whether any unrestricted funds that were properly attributable to the state flowed to religious institutions, *see Agostini*, 117 S. Ct. at 2012-14; *Rosenberger*, 515 U.S. at 840-43; *Zobrest*, 509 U.S. at 10-13; *Witters*, 474 U.S. at 487; *Muller*, 463 U.S. at 399-400.

Once the Wisconsin court's misguided reliance on evenhandedness is corrected, there can be no question that the amended MPCP fails the Establishment Clause neutrality test for the simple reason that it undeniably advances religion. Under the amended MPCP, religious schools can use state funds to finance the religious facets of their students' education, not merely identifiable secular or supplemental components of the curriculum. This feature distinguishes the amended MPCP from the aid programs at issue in many of the *Muller-Agostini* cases upon which the Wisconsin court relied, where no unrestricted government funds ever reached the coffers of religious schools. *See Agostini*, 117 S. Ct. at 2012-13 (distinguishing aid that would "impermissibly finance religious indoctrination" because it "supplanted" instruction provided by sectarian schools from the aid at issue, which constituted a permissible "supplement[] to the regular curricula"); *Zobrest*, 509 U.S. at 12 (aid was a "neutral service" and would not "relieve[] sectarian schools of costs they otherwise would have borne in educating their students"); *Rosenberger*, 515 U.S. at 842 (the Court was "not confront[ing] a case where . . . the government is making direct money payments to an institution or group that is engaged in religious activity"); *Muller*, 463 U.S. at 390-91 (parents allowed to take education-related tax deductions). This Court has consistently recognized that substantial, unrestricted aid to religious schools "'necessarily results in aid to the sectarian school enterprise as a whole,' and therefore brings about 'the direct and substantial advancement of

religious activity.'" *Zobrest*, 509 U.S. at 12 (quoting *Meek v. Pittenger*, 421 U.S. 349, 366 (1975)).[3/]

This Court should thus grant certiorari to reaffirm that a state aid program does not satisfy the Establishment Clause test of neutrality toward religion merely by allowing state funds to flow to secular as well as sectarian schools. The Court should make clear that programs such as the amended MPCP unconstitutionally advance religion by making state funds available to religious schools for an unrestricted range of sectarian activities.

B. The Wisconsin Court Ignored The Unbroken Path Between State Appropriations And Church Coffers.

The Wisconsin Court also found that the amended MPCP does not violate the fundamental Establishment Clause prohibition against state funding of religious indoctrination, *see Agostini*, 117 S. Ct. at 2012, because the state provides the aid "by individual checks made payable to the parent of each pupil attending a private school under the program" and therefore any aid that flows to sectarian schools does so only "as a result of the necessary and intervening choices of individual parents." (Pet. App. at 28a.) But the Wisconsin

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[3/] Moreover, in considering whether the amended MPCP had the effect of advancing religion, the Wisconsin court all but ignored the critical difference between the original program and the amended MPCP — the original program was explicitly amended in 1995 to allow religious schools to participate. As the Wisconsin Court of Appeals noted, the decision to expand the program to include sectarian schools clearly had the effect of promoting religion: "Whatever benefit to private schools is conferred by the amendments in the Act is 'in reality one confined to those religious groups which operate' the eighty-nine sectarian schools that became eligible to participate as a result of the passage of the amended program." *Jackson v. Benson*, 570 N.W.2d 407, 418 (Wis. Ct. App. 1997) (citation omitted). (Pet. App. at 77a-78a.)

Court misunderstood this Court's precedents when it suggested that either the amended MPCP's administrative sleight-of-hand in making the parents payees, or the limited "choices" available to parents, alters the MPCP's fundamentally unconstitutional character.

This Court has consistently held that the substance of state aid, and not merely its form, determines whether aid to religious schools passes constitutional muster. The relevant question is not whether state aid is nominally directed to parents or to religious schools, but whether a "meaningful distinction can be made between aid to the student and aid to the school" or whether the purported distinction is instead "a transparent fiction." *Witters*, 474 U.S. at 487 n.4 (internal quotation omitted). Under the amended MPCP, the distinction is in fact a transparent fiction — the checks are sent to the religious schools, and they "can be cashed only for the cost of the student's tuition." (Pet. App. at 27a.) These checks are thus very different from state paychecks that a recipient government employee may freely donate to a religious institution. *Compare Witters*, 474 U.S. at 486-87.

In fact, in *Nyquist*, the Court found it unquestionable that tuition reimbursements could not be given directly to sectarian schools, and considered only "whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result." 413 U.S. at 781. The Court concluded resoundingly that it did not. *Id.* at 781-86. *See also Wolman*, 433 U.S. at 250 (striking down a program of lending educational materials directly to students rather than religious schools because "[d]espite the technical change in legal bailee, the program in substance is the same as before").

Perhaps recognizing that this Court's decisions foreclose an argument that using parents to launder public funds before

they are distributed to sectarian schools removes the unconstitutional taint, the Wisconsin court emphasized that money flows to religious schools only as the result of parental choice. (Pet. App. at 28.) The court's "choice" argument, however, is also inconsistent with this Court's precedents.

First, as a practical matter, the amended MPCP does not allow for the type of "'genuinely independent and private choices'" that this Court has discussed in its Establishment Clause cases. *Zobrest*, 501 U.S. at 9 (quoting *Witters*, 474 U.S. at 487). Unlike aid programs this Court has approved in previous cases, choice is restricted because the amended MPCP's benefits are not "available to all children who meet the [program's] eligibility requirements, no matter what their religious beliefs or where they go to school." *Agostini*, 117 S. Ct. at 2014. Parents who are willing to send their children to religious schools possess far greater options and thus have a greater opportunity to enjoy the program's benefits than those parents who are not.[4/] The amended MPCP is thus very different from the aid programs that this Court upheld in the *Muller-Agostini* line of cases in which benefits were available to all students regardless of where they attended school, and this Court should reaffirm that the Constitution does not tolerate programs that "give aid recipients any

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[4/] The amended MPCP thus implicates the concerns for endorsement of religion that the Court has repeatedly expressed. Parents who do not want to send their children to religious schools are not able to share in the program's full benefits and are thus "outsiders" rather than full members of the community. See, e.g., *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94 (1989) ("The Establishment Clause, at the very least, prohibits government . . . from 'making adherence to a religion relevant in any way to a person's standing in the political community.'") (citation omitted); *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) ("[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community").

incentive to modify their religious beliefs or practices in order to obtain" government aid. *Agostini*, 117 S. Ct. at 2014.

Second, the "choice" that allows public money to flow to religious schools is not one that "'[could] not be attributed to state decisionmaking.'" Id. at 2012 (quoting *Zobrest*, 509 U.S. at 10). This is not a general government benefit under which "aid is provided to students at whatever school they choose to attend." *Agostini*, 117 S. Ct. at 2013. *See also Zobrest*, 509 U.S. at 19. Instead, the state has established a large-scale program that encourages students to attend private sectarian schools as an alternative to Milwaukee's public schools and systematically channels public tax dollars into those religious schools. The Wisconsin court's argument that public funds reach religious schools only as a matter of a "choice" that cannot be attributed to the government proves far too much. It would effectively eliminate any restrictions on government funding of religious activity as long as the funds were channelled through individuals. In effect, such logic would allow the government to create a per capita subsidy for various religious groups whereby the government could give each citizen money to donate to the religious organization of his or her choice. But this Court has never considered the sort of limited "choice" available to Milwaukee parents to be the cure-all that the Wisconsin court suggests it is.

For example, the *Nyquist* Court treated as insignificant the fact that parents would receive tuition reimbursements whether they sent their children to religious or non-religious private schools because the program lacked "an effective means of guaranteeing that state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes." 413 U.S. at 780. Similarly, in *Wolman*, the Court held that a program under which the state loaned instructional material and equipment for use in both secular

and sectarian schools was not saved by making the loans to the students rather than directly to the schools. 433 U.S. at 248-51. *See also Rosenberger*, 515 U.S. at 871 (Souter, J., dissenting) (noting Madison's opposition to a tax collecting funds to be distributed to religious institutions or "seminaries of learning" at the taxpayer's choice). At heart, the argument that parental choice breaks the church-state link is no more than a reprise of the argument that "evenhandedness" does so: neither negates the reality that, under the amended MPCP, the government is advancing religion.

II. THIS CASE PRESENTS AN IMPORTANT OPPORTUNITY TO REAFFIRM FUNDAMENTAL ESTABLISHMENT CLAUSE PRINCIPLES.

The Court has long recognized that "[t]he 'establishment of religion' clause of the First Amendment means at least" that "[n]o tax in any amount, large or small, can be levied in support of any religious activities or institutions." *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947). The Court has relied upon this bedrock principle regularly to strike down "programs that entail an unacceptable risk that government funding would be used to 'advance the religious mission'" of an institution receiving aid. *Bowen v. Kendrick*, 487 U.S. 589, 612 (1987).[5/]

The Court has never renounced this fundamental proposition of constitutional law. *See, e.g.*, *Rosenberger*, 515 U.S. at 841 ("Our decision . . . cannot be read as addressing an expenditure from a general tax fund."); *id.* at 852 (O'Connor, J., concurring) (the Court is not "signal[ing] the demise of the funding prohibition in Establishment Clause

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[5/] *See, e.g.*, *Meek v. Pittinger*, 421 U.S. 349, 370 (1975); *Tilton*, 403 U.S. at 683.

jurisprudence"). Unfortunately, however, this basic principle has been obscured by the heated battle of dicta that characterizes so much of Establishment Clause litigation.

The amended MPCP undeniably conflicts with this elemental First Amendment principle. Under the amended MPCP, and other programs of its kind, regardless of the extent to which program benefits are distributed evenhandedly, and regardless of the degree to which "choice" is available to parents, the basic fact remains that citizens' tax dollars are being spent to support religious schools. The state is transferring part of its revenues to religious schools, and it "does not prohibit the participating sectarian private schools from using funds for any purpose the school deems appropriate," including solely religious purposes. (Pet. App. at 66a.) The amended MPCP presents much more than a mere "risk" that government funding will be used to advance these schools' religious missions: it directly involves the impermissible "sponsorship . . . of the sovereign in religious activity." *Waltz v. Tax Commission*, 397 U.S. 664, 668 (1970). It is precisely this type of systematic government subsidization and endorsement of religion that lies at the core of the Establishment Clause prohibition. *E.g.*, *McCollum*, 333 U.S. at 210; *Everson*, 330 U.S. at 13-15. The Wisconsin court lost sight of this guiding principle and went astray, and this Court should lead it back to the correct path.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the
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Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE WISCONSIN SUPREME COURT

MOTION AND BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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MOTION OF NATIONAL SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

The National School Boards Association (NSBA) respectfully moves this Court to grant it leave to file the attached brief as *amicus curiae* in the above captioned case. Petitioners have consented to NSBA's participation in this matter. A letter attesting to their consent has been submitted to this Court.

Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Guam, Hawaii, and the U.S. Virgin Islands. NSBA represents the nation's 95,000

school board members. These board members govern 14,772 local school districts that serve more than 46.5 million public school students – approximately 90 percent of all elementary and secondary school students in the nation.

NSBA has a longstanding interest in educational policy and has been a frequent contributor of *amicus* briefs in this Court on these issues – *E.g., Plyer v. Doe*, 457 U.S. 202 (1982) (equal protection – undocumented alien students); *Rowley v. Board of Education*, 510 U.S. 1202 (1982) (IDEA – educational methodology); *Washington v. Seattle Public Schools*, 458 U.S. 457 (1982) (equal protection – voluntary desegregation); *Board of Education of Paris v. Vail*, 466 U.S. 377 (1984) (procedural due process – "property" interest in continued employment); *Irving Independent School Dist. v. Tatro*, 469 U.S. 809 (1984) (IDEA - related services); *New Jersey v. T.L.O.*, 469 U.S. 325 (1984) (student search and seizure); *Smith v. Robinson*, 464 U.S. 932 (1983) (IDEA – attorneys' fees); *Oklahoma v. Gay Task Force*, 470 U.S. 903 (1985) (teacher free speech – statute forbidding speech outside school on subject of gay rights); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) (procedural due

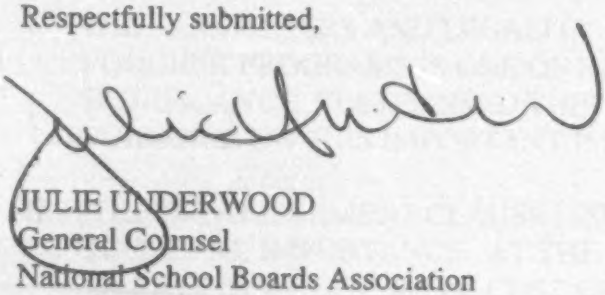
process – teacher's right to pre-termination hearing); *Ansonia Board of Education v. Philbrook,* 479 U.S. 60 (1986) (Title VII of Civil Rights Act – accommodation of teacher's religious beliefs); *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675 (1986) (student free speech); *Bowsher v. Synar,* 478 U.S. 714 (1986) (separation of powers – legislative veto); *Memphis Community School Dist. v. Stachura,* 477 U.S. 299 (1986) (teacher free speech – damages); *Wygant v. Jackson Board of Education,* 478 U.S. 1014 (1986) (equal protection – layoffs on basis of race to promote "role models"); *School Board of Nassau County v. Arline,* 481 U.S. 1024 (1987) (Section 504 – teacher with infectious disease); *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260 (1988) (student free speech – school newspaper); *Honig v. Doe,* 484 U.S. 305 (1988) (IDEA – removal of violent disabled student); *DeShaney v. Winnebago Dept. of Social Services,* 489 U.S. 189 (1989) (substantive due process – duty to protect child from parents/guardians); *Board of Education of Westside Community Schools v. Mergens,* 496 U.S. 226 (1990) (Equal Access Act – establishment of religion, meaning of "curriculum-related"); *Pacific Mutual Life Ins. Co. v. Haslip,* 499 U.S. 1

(1991) (due process – punitive damages); *Lee v. Weisman*, 505 U.S. 577 (1992) (establishment of religion – clergy-led graduation prayer); *Florence County Dist. 4 v. Carter*, 510 U.S. 7 (1993) (IDEA – duty to pay tuition at uncertified private school); *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993) (establishment of religion, free speech – use of school facilities); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (establishment of religion – providing interpreter to child in religious school); *Grumet v. School Dist. of Kiryas Joel*, 512 U.S. 687 (1994) (establishment of religion – state formation of separate religious school district); *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995) (establishment of religion and free speech – funding of student religious newspaper); *United States v. Lopez*, 514 U.S. 549 (1995) (interstate commerce clause – limitation of congressional authority); *Vernonia School Dist. v. Acton*, 515 U.S. 646 (1995) (student search and seizure); *Board of Education of Piscataway v. Taxman*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 117 S.Ct. 2506, *writ dismissed*, 118 S.Ct. 595 (1997) (Title VII – layoffs on basis of race to promote "diversity"); *Gebser v. Lago Vista*

Independent School Dist., 118 S.Ct. 1989 (1998) (Title IX – standard of liability imposed on school district for teacher on student sexual harassment); *Cedar Rapids School District v. Garret F.*, 106 F. 3d 822 (8th Cir. 1997), *cert. granted,* 118 S.Ct. 1793 (1998) (IDEA- scope of medical services exclusion).

Because this case has such direct bearing on how state legislatures will resolve this educational issue, NSBA respectfully requests the opportunity to advise this Court more fully of the urgency of review in this matter.

Respectfully submitted,



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BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

Petitioners have consented to the filing of this brief.[1] Their consent is on file with the Clerk.

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[1] This brief was written by National School Boards Association (NSBA) who is *amicus curiae* before this Court and not in any part by counsel for either party. No person or entity other than NSBA has made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS*

Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Guam, Hawaii, and the U. S. Virgin Islands. NSBA represents the nation's 95,000 school board members. These board members govern 14, 772 local school districts that serve more than 46.5 million public school students – approximately 90 percent of all elementary and secondary school students in the nation. NSBA has had a longstanding interest in the effective development and implementation of local school board policies, including those touching on the Establishment Clause.

STATEMENT OF THE CASE

In 1989 the Wisconsin legislature enacted the Milwaukee Parental Choice Program (MPCP). This program permitted up to 1.5% of the Milwaukee Public School population to attend private nonsectarian schools within the city with the state paying the tuition costs. Both the students and the schools had to meet certain eligibility requirements. To be eligible, a student had to be

- in grades K-12;
- from a family whose income did not exceed the federal poverty level by more than 1.75 times; and
- either enrolled in a Milwaukee public school, enrolled in a private school under the program, or not enrolled in any school the previous year.

School requirements involved compliance with certain state and federal health, safety, education, and civil rights laws. In addition, the schools had to meet defined performance criteria and submit to state financial and performance audits. For each student enrolled under the program, the state proportionately reduced the amount of the aid it provided to the Milwaukee Public Schools.

In 1995 the Wisconsin State Legislature amended the MPCP to increase the percentage of students eligible to 15% and open the program to sectarian private schools. Sectarian schools, in addition to the other eligibility requirements, had to agree under an "opt out" provision not to *require* any program student to participate in any religious training, indoctrination or education. In addition, the amended program modified the method of payment to participating schools. Tuition payments are issued to

the parent/guardian, but delivered to the school where the parent/guardian is required to endorse the check to the private school.

The amended program was challenged on several state and federal grounds. On June 10, 1998 the Wisconsin Supreme Court held that the amended Milwaukee Parental Choice Program (MPCP) does not violate the Establishment Clause of the First Amendment.

The issue involved in the requested review centers on the Establishment Clause claim. The Wisconsin majority opinion applied the *Lemon v. Kurtzman*, 403 U.S. 602 (1971), test to the amended program to determine constitutionality. The court dealt swiftly with the primary purpose and entanglement prongs, providing a more detailed analysis of the primary effect prong. It stated that the two most important factors in determining if a state law has the primary effect of advancing religion is whether the law is neutral regarding religion and whether any benefits it may bestow on religion are indirect. After reviewing several cases involving state educational assistance programs that provide public aid to both nonsectarian and sectarian institutions, it stated that the U.S. Supreme Court has established the general principle

that such programs do not have the primary effect of advancing religion if the public aid is provided: on the basis of neutral, secular criteria that neither favors nor disfavors religion; and only as the result of numerous private choices of individual parents/guardians does a sectarian institution receive a benefit. Applying this principle to the provisions of the amended MPCP, the Wisconsin Supreme Court found that the eligibility rules for students are of a secular nature and selection for participation in the program is made on the basis of religiously neutral criteria. It also pointed out that the "opt out" provision of the program shields students from mandatory participation in religious activity. Finally, the court found that state funds which end up flowing to sectarian schools, do so only after individual parents/guardians of students make private choices to enroll students in those schools. As a result, the court concluded that the amended MPCP does not have the primary effect of advancing religion.

The dissent, in which the Chief Justice joined, agreed with the Wisconsin Court of Appeals that the entire amended MPCP should be struck down because it violates Establishment principles.

ISSUE PRESENTED FOR REVIEW

Does the Milwaukee Parental Choice Program violate the Establishment Clause of the First Amendment to the United States Constitution?

ARGUMENT

I. THE PARAMETERS AND LEGALITY OF SCHOOL VOUCHER PROGRAMS IS ONE OF NATIONAL SIGNIFICANCE. STATES NEED THIS COURT'S GUIDANCE ON THIS IMPORTANT ISSUE.

Unlike the original MPCP this is not a small experimental program. Approximately 122 private schools in the Milwaukee area are eligible to receive taxpayer subsidized tuition under the current MPCP. Up to 15,000 students are eligible to transfer to eligible private school. This number exceeds the total student population of all but 5 of Wisconsin's 427 school districts. Wisconsin Dept. of Public Instruction, *Basic Facts about Wisconsin Elementary and Secondary Schools.* Stated another way, the total number of students eligible to participate in the program exceeds the student population of approximately 99% of Wisconsin's public school districts.

MPCP fosters private education at the expense of public schools. MPCP is designed to provide taxpayer funding for a specified class of private schools. With the transfer of students to this special class of schools goes the transfer of state dollars otherwise earmarked for the support and maintenance of the

Milwaukee Public Schools. The Milwaukee Journal reported that Governor Tommy Thompson was clear in his intention to create a new class of public schools through MCPC. Thompson has said he wants to push education reforms that have at their root a new definition of public schools. Steve Schultze, *Budget Lets State Fund Parochial Schools,* MILWAUKEE JOURNAL, March 12, 1995, B.1. Instead of defining public education in terms of a system publicly owned, publicly staffed, and publicly controlled, MCPC defines public education as publicly funded but privately controlled. He wants public funding to follow the student.

The debate surrounding the use of tax dollars to support private and religious schools began over 25 years ago. During that time, voucher proponents have built and refined their arguments to attract maximum support from an array of special interests. Voucher proponents want public funds to support private and religious schools in order to promote their particular religious or moral beliefs – to have the state financially support their retreat to their own segregated educational enclaves.

There is substantial activity in the states on school vouchers. As can be seen graphically, many states have been

touched by this issue in the last two years. [See map below.] The issue has generally been presented as tuition tax benefits or tuition vouchers. This Court resolved the issue of tuition tax benefits in *Mueller v. Allen*, 463 U.S. 388 (1993). Similar guidance is now needed from this Court as they consider voucher programs.

STATE VOUCHER ACTIVITY SINCE 1996

TTC = Tuition tax credit program
F = Voucher proposal failed
V = Voucher programs active or in pending litigation

Currently three states have tuition tax credit/deduction programs which allow parents/guardians to offset the cost of private education through a reduction in state tax liability. Since

Mueller v. Allen, 463 U.S. 388 (1993), these state provisions have included tuition at private and religious schools as eligible deductions.

- Arizona - The state tax code allows residents to claim a tax credit of up to $500 for donations to charitable organizations who provide scholarships for students to attend private and religious schools. ARIZ. REV. STAT. ANN. § 43-1089 (1997). The constitutionality of this is being considered by the Arizona Supreme Court in *Kotterman v. Killian*, No. C-B970412-SA (pending Ariz. S.Ct. 1998).
- Iowa - Parents/guardians are entitled to take a tax deduction of up to $1000 per child in school with a limit of four deductions per family. IOWA CODE ANN. § 422.12.
- Minnesota - Parents/guardians are allowed tax deductions for educational expenses up to $2500 per child. Families with incomes of less than $33,500 are entitled to a tax credit of $1,000 per child for educational expenses. MINN. STAT. ANN. § 290.0674 (1997).

In 12 states, efforts to institute school voucher programs have failed.

- Delaware - A bill to provide vouchers was not passed out of the state's education committee. Heritage Foundation, School Choice Programs (1998).
- Florida - In April, 1998, the state house passed a limited program providing a $3,500 tuition voucher for preschoolers. The Blum Center's Educational Freedom Report, No. 58, April 24, 1998.
- Georgia - The state refused to enforce an anti-desegregation law which provided grants to white families seeking to opt out of desegregated schools. *Lowe v. State*, 482 S.E.2d 344 (Ga. 1997).
- Illinois - A bill providing means tested vouchers for students in Chicago was considered. It was not passed out of the state's rules committee. CHURCH AND STATE MAGAZINE, *Status of the States: Tax Aid to Religious Schools* (1996).
- Kentucky - A tuition voucher bill was introduced, but failed to be passed out of the Senate's education committee. Heritage Foundation, School Choice Programs (1998).

- Maryland - A tuition voucher bill was introduced, but failed to be passed out of committee. The Blum Center's Educational Freedom Report, No. 54, December 19, 1997.
- Mississippi - The Governor proposed a ballot initiative called the People's Right to Initiate Model Education (PRIME) which would allow local communities to adopt voucher programs. PRIME has received the required number of signatures to appear on a state ballot in 1998. Heritage Foundation, School Choice Program (1998).
- Missouri - A tuition voucher bill was introduced but failed to be passed out of committee. Heritage Foundation, School Choice Programs (1998).
- New Hampshire - A tuition voucher bill introduced in 1998 was defeated in the state legislature. Fax from New Hampshire School Boards Association on September 24, 1998.
- New Jersey - In 1997 the Lincoln Park School District implemented a program permitting high school students to attend either a public or private school at public expense. The

state education commissioner ruled against the program. Heritage Foundation, School Choice Programs (1998).

- New York - A tuition voucher bill was introduced but failed to be passed out of committee. Heritage Foundation, School Choice Programs (1998).
- Oregon - In 1997 a tuition voucher bill was introduced, but failed to be passed out of committee. Fax from John Marshall, Director of Legislative Services; Oregon School Boards Association, September 25, 1998.

Eight states have judicial action regarding vouchers.

- Colorado - A class action suit was brought in 1997 by parents/guardians claiming the Denver school system had failed to teach basic skills. The parents/guardians are seeking tuition vouchers as a remedy. DENVER POST, May 8, 1997.
- Maine - In *Bagley v. Town of Raymond*, a Cumberland County Superior Court rejected parents' allegations that the state's refusal to allow them use of vouchers for religious schools is a free exercise violation. The parents' appeal is pending before

the state supreme court. PORTLAND PRESS HERALD, April 7, 1998.

- Massachusetts - Parents/guardians of parochial school students filed suit against the state, challenging the state constitution's prohibition on the use of public funds for religious schools as a free exercise violation. The Freedom Forum, May 14, 1998.

- Ohio - In 1996 a voucher program for Cleveland students was enacted. The program included religious schools. The program was challenged. In May 1997 the Ohio Court of Appeals found both the U.S. and Ohio Constitutions were violated by the program. *Simmons-Harris v. Goff*, 1997 WL 217583 (Ohio App. 10 Dist.). The case was appealed to the Ohio Supreme Court. The Ohio Supreme Court granted a stay pending its decision. *Simmons-Harris v. Goff*, 684 N.E 2d 705 (Ohio 1997).

- Pennsylvania - The Southeast Delaware County School Board implemented a private school voucher program, including religious schools. The program was challenged; the case is still pending. *Giacomucci v. Southeast Delaware County*

School District, No. 98-5805 (Del. County Ct. of Com. Pleas, argued, Sept. 2, 1998).

- Texas - Houston School District implemented a program under the state's Contracts for Educational Services Act which allows school districts to place students at private schools at public expense. TEX EDUC. CODE ANN. § 11.157 (1997).
- Vermont - The town of Chittenden filed an action to enable its students to attend religious schools at public expense. Trial court ruled against the town on establishment grounds. The case is pending before the Vermont Supreme Court. PORTLAND PRESS HERALD, April 7, 1998.
- Wisconsin - the instant case pending on writ of *certiorari*.

Regardless of whether voucher plans are good for needy children in overtaxed urban public schools (and we contend they cause more harm than good), the state must overcome the First Amendment's bar against church-state entanglement before it can fund religious schools directly.

II. THE ESTABLISHMENT CLAUSE ISSUE IS OF NATIONAL IMPORTANCE. AT THE CORE OF THIS DEBATE IS WHETHER THE COST OF RELIGIOUS EDUCATION CAN BE CONSTITUTIONALLY SHIFTED FROM THE BELIEVER TO THE TAXPAYER.

The question is whether the Establishment Clause requires a subsidy to parents/guardians of children who attend religious schools equal to the per pupil funding of the public schools. The Establishment Clause does not require a public subsidy from religious education - it prohibits it.

This Court has held that, "The clearest command of the Establishment Clause is that one religion cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Equally important, the Establishment Clause prohibits favoritism to any religion. *See* D. Laycock, *Nonpreferential Aid to Religion - A False Claim About Original Intent*, 27 Wm. & M. L. Rev. 875 (1991).

> "Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion, see, e.g., *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989)), it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)."

County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 603 (1989).

In *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 840 (1995), this Court stated that a tax levied for the direct support of a church "would run contrary to Establishment Clause concerns, dating from the earliest days of the republic."

This Court, in previous cases has dealt with the issue of public funding of religious education. In these cases, this Court has held that the Establishment Clause does not allow direct public funding of religious education. E.g., *PEARL v. Nyquist*, 413 U.S. 756, 788 - 89 (1973); *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975).

Neither is the state required to provide such equal expenditures on religious education as a part of a free exercise claim. In *Leutkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974), parents/guardians of parochial school students challenged Missouri's refusal to provide them with free bus transportation while providing such transportation to public school students. Citing *Brusca v. State*, 332 F. Supp. 275, 279 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972), the three judge

court rejected the claim. *Accord Witters v. Washington Dept. of Services for the Blind*, 112 Wa.2d 363, 771 P.2d 1119, *cert. denied*, 493 U.S. 850 (1989). While a school may constitutionally provide services, such as a sign language interpreter, *Zobrest v. Catalina Foothills I.S.D.*, 509 U.S.1 (1993), it is not required to do so constitutionally. *Goodall v. Stafford County School Board*, 60 F.3d 168 (4th Cir. 1995).

This Court has upheld the provision of services to religious schools. However, permitting public school teachers to go into religious schools to instruct students in remedial courses is not the same as directly funding religious instruction. The MPCP is direct funding of religious instruction – no more, no less.

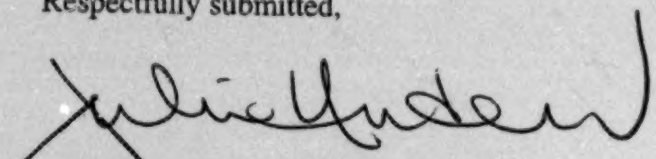
Recall Justice Souter's words in *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997), we tend "to forget the hard lessons, and to overlook the history of governmental partnership with religion when ... bureaucrats have programs. That tendency to forget is the reason for having the Establishment Clause (along with the Constitution's other structural and libertarian guarantees), in the hope of stopping the corrosion before it starts." 117 S.Ct. at 2021 (Souter, J. dissenting).

CONCLUSION

Proponents of educational vouchers offer beguiling promises of the benefits sure to follow if private schools are made available to all parents/guardians. The assumptions are that: private schools are better than public schools; private schools will open their doors to any parent who knocks; innovative private schools will spring up in the private sector; public schools, sluggish from years of holding a monopoly, will be jolted to life by competition from private schools and propelled toward long needed reforms. This is not a logical reality. Vouchers are *not* an educational panacea. Vouchers are *not* a path to improving public education. In fact, proponents of vouchers are asking us to abandon the public schools. They are asking for a government handout of our tax dollars to benefit their own narrowly tailored interests.

Amicus requests that this court grant *certiorari* to settle the controversy over the legal parameters of school voucher programs and offer state legislatures and courts clear guidance.

Respectfully submitted,



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No. 98-376

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

WARNER JACKSON, *et al.*,
Petitioners,
v.
JOHN T. BENSON, *et al.*,
Respondents.

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, *et al.*,
Petitioners,
v.
JOHN T. BENSON, *et al.*,
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NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

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REPLY BRIEF OF PETITIONERS

Briefs in response to our Petition for Certiorari have been filed by respondents State of Wisconsin ("State"), Parents for School Choice *et al.* ("PSC"), and Marquelle Miller *et al.* ("Miller"). Although the three respondent

parties are united in disputing our legal contentions, they are not of one mind with regard to the question at issue here—whether this case warrants the attention of this Court. While the State and the Miller respondents oppose granting the Petition—notwithstanding the State's acknowledgement that the issue it presents "is of profound legal and practical importance, both to Wisconsin and to the Nation," State Br. at 1—PSC urges this Court to grant review, contending that this is the "ideal" case for clarifying the constitutional boundaries applicable to private school tuition voucher programs, PSC Br. at 13, and for removing the "constitutional cloud," *id.* at 4, that shrouds both those programs that have been enacted and those that are under consideration in various legislative forums.

The State and the Miller respondents oppose the Petition for two reasons: First, they deny that the decision below is—as we contend—in irreconcilable conflict with the decision of this Court in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). Second, they suggest that this Court should wait for some other case to address the issues presented here. We reply briefly to both points.[1]

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[1] We do *not* reply, however, with respect to two other kinds of issues raised by respondents' briefs. First, respondents devote far more attention to arguing the merits of the Establishment Clause issue than to discussing whether it warrants this Court's attention. We sketched briefly in the Petition our view of why this Court's more recent cases do not undermine its 1973 holding in *Nyquist*, *see* Pet. at 17-19, and further elaboration of this argument is more appropriately reserved for briefing on the merits, should the Petition be granted. What respondents' contentions amply confirm, however, is our point that this Court should revisit this issue because its "post-*Nyquist* jurisprudence has proved susceptible to such radically differing interpretations." Pet. at 19.

Second, all of the respondents discuss at some length the problems of urban education and the supposed merits of "parental choice" programs as a means of addressing these problems. *See* State Br. at 3 ("Any consideration of the constitutionality of the expanded Choice Plan must begin with a frank recognition of the serious

1. The core of the argument against Certiorari offered by the State and the Miller respondents is the contention that the decision below is not, in fact, in conflict with this Court's precedent in *Nyquist*. Indeed, even PSC —while agreeing that this Court must bring clarity to this area of the law—maintains that the Wisconsin Supreme Court correctly distinguished the facts of the instant case from those before this Court in *Nyquist*.

While slightly more extended, respondents' efforts to identify a material distinction between the Amended Milwaukee Parental Choice Program ("Amended MPCP") and the New York tuition reimbursement program at issue in *Nyquist* are no more successful than the Wisconsin Supreme Court's disposition of the same question in a brief footnote. *See* Pet. App. at 19a n.9. Indeed, except for some additional arguments by the State, *see infra* pp. 5-6, respondents' contentions that this case is different from *Nyquist* begin and end with the one point advanced by the court below. As the State puts it:

> [A]s the Wisconsin court recognized, "[i]n *Nyquist*, each of the facets *of the challenged program* directed aid exclusively to private schools and their students." Pet. App. 19a n.9 (emphasis added). The expanded Choice Plan, by contrast, "provides a neutral benefit to qualifying parents [of MPS students]," because,

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porblems facing the [Milwaukee Public Schools]."); PSC Br. at 1-2, 6-10; Miller Br. at 1-6, 24-26. Petitioners have very strong views, sharply at odds with those of the respondents, as to whether such "choice" programs that skim off a few students from relatively highly motivated families and place them in private schools will solve the problems of urban education or, to the contrary, only compound those problems and prevent the development of meaningful solutions. But the question of whether the Amended MPCP is sound public policy is not the issue before this Court. We agree with the sentiment expressed by the Miller respondents—at the conclusion of their public-policy discussion—that "[p]etitioners should save their policy arguments for the legislature." Miller Br. at 26. So should respondents.

> *"viewed in its surrounding context,"* it "merely adds religious schools to a range of pre-existing educational choices available to MPS children." *Id.* [State Br. at 23 (emphasis altered).]

See also PSC Br. at 16-17; Miller Br. at 15.

We have altered the emphasis in this quotation from the State's brief in order to illustrate the glaring defect in the analysis of the court below, which is adopted by all three respondent parties: the *Nyquist* program is compared to the Amended MPCP by looking, in the former case, to where public funds go under "the challenged program" standing alone, while, in the latter case, viewing the program "in its surrounding context" of the state's overall education offerings. Only by skewing the comparison in this way are respondents able to assert that while the aid provided in *Nyquist* went solely to parents of children in private schools, that provided here is available for use, at the parents' option, in public or private schools.

The asserted distinction between the Amended MPCP and the *Nyquist* program is, in other words, not one of "seminal fact" (as the court below put it, Pet. App. at 19a n.9), but rather simply a matter of differently characterizing two factually identical programs. The fact is that, both here and in *Nyquist*, "the challenged program" provided funds for use only in private schools. The fact is that New York in 1973 and Wisconsin today offered free public schools, and that parents eligible for the tuition grants provided under both voucher programs could choose whether to send their children to the public schools or accept the voucher for use at private schools.[2] The

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[2] There is, to be sure, one difference between the New York program and the Amended MPCP in this regard. While New York offered reimbursement of only 50% of private-school tuition, the Amended MPCP in most cases pays *more* than tuition. But we do not believe respondents mean to suggest that this difference is a basis for distinguishing *Nyquist*, for that would be to say that the

fact is that in both cases the great majority of all children educated at public expense were educated in the public schools, so that one could choose to characterize either program—"viewed in its surrounding context"—as involving benefits "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Nyquist*, 413 U.S. at 782-83 n.38.

The *Nyquist* Court did not so characterize the program before it, however; indeed, it specifically rejected that approach (advocated by a dissenting opinion) as leading to results "wholly at variance with the Establishment Clause." *Id.* That is not the key point here, however. Rather, what is important for present purposes is that there is simply no factual basis for distinguishing the Amended MPCP from the program that was before this Court in *Nyquist*: whether one looks to "the challenged program" or views that program "in its surrounding context," so long as a consistent perspective is applied there is no material difference that could form a basis for distinguishing *Nyquist* from the instant case.

The State also advances several other purported distinctions between the two cases, State Br. at 24-25, but in so doing it overlooks the elementary point that, as Chief Judge Posner recently put it, "[i]t is not cricket to distinguish a precedent by pointing to a fact mentioned by the court in the previous opinion but clearly given no weight by it. Otherwise no precedent would have any force, for no two cases are exactly alike." *Khan v. State Oil Co.*, 93 F.3d 1358, 1362 (7th Cir. 1996), *vacated on other grounds*, 118 S. Ct. 275 (1997). The State contends that the *Nyquist* program and the Amended MPCP were animated by "decidedly different goals," State Br. at 24, but that is irrelevant even if it is right, for *Nyquist*

New York program was unconstitutional because it paid *too little* of the cost of a sectarian school education.

did not turn on the *purpose* of the program but rather its effect, *see* 413 U.S. at 774, and petitioners do not contend that the Amended MPCP is invalid because of its purpose. Nor is it possible to discern any constitutional relevance in the distinction that the Amended MPCP is targeted to low-income parents (as was, indeed, the tuition reimbursement program in *Nyquist, see* 413 U.S. at 764) and to one school district. State Br. at 24-25.

Finally, the State's assertion that "the *Nyquist* Court emphasized that the New York statute placed no restrictions on private schools," *id.* at 25 (citing 413 U.S. at 782-83) completely misses the point of the passage it cites. The lack of "restrictions" of which this Court complained in *Nyquist* was the lack of any restrictions *on how the public funds would be spent*:

> The tuition grants here are subject to no such restrictions. There has been no endeavor "to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former." [413 U.S. at 783.]

Precisely the same is true here: on this critical point the Amended MPCP and the program struck down in *Nyquist* are identical.[3]

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[3] The State also alludes in this connection to the statutory provision that purports to permit MPCP students to "opt out" of religious activities, Wis. Stat. § 119.23(7)(c). While the *Nyquist* program contained no such provision, this is hardly a relevant distinction where the issue is whether taxpayers can be made to help pay for the religious education of other people's children. Absent the unrealistic assumption that every MPCP pupil would exercise the right to opt out of all religious activities, the "opt out" provision merely underscores that taxpayer funds will be expended to support religious education and other religious activities. Moreover, while it might be feasible for students to "opt out" of certain discrete activities, such as a religion class or perhaps even a morning prayer, it is wholly unrealistic to think of "opting out" of a religious education in the setting of a "pervasively sectarian" school where "[t]he very purpose . . . is to provide an integrated secular

In point of fact, the Amended MPCP is on all fours with *Nyquist* on every point this Court deemed important in striking down the New York tuition reimbursement program. Although the court below chose not to recognize this point—and instead brushed off this Court's precedent as distinguishable on wholly unsupportable grounds—the fact remains that the lower court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup Ct. R. 10(c).

2. Viewed against this background, the State's assertion that this case is a "poor vehicle" for resolution of the continuing vitality of this Court's decision in *Nyquist*, State Br. at 22, rings utterly hollow. It is unlikely that this Court would have another case in which the issues raised here would be presented any more squarely and unavoidably than in the instant case. As respondent PSC—whose attorneys have been involved in all of the pending voucher cases—points out, "[a]mong the cases involving parental choice presently in litigation around the nation, this case provides the best opportunity for the Court to resolve the common constitutional question." PSC Br. at 13.[4]

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and religious education." *Meek v. Pittenger*, 421 U.S. 349, 366 (1975); *see* Pet. App. at 66a-67a, 149a-151a (quoting literature of schools participating in Amended MPCP). Nor is it realistic to believe that, simply because the statute formally gives students a choice to absent themselves from religious activities, participation in such activities is "voluntary" in any meaningful sense. *Cf. Lee v. Weisman*, 505 U.S. 577, 592-95 (1992). In short, the statutory "opt out" provision is of no substance or relevance to the issue presented in this case.

[4] As we pointed out in the Petition, while a number of cases pending in the lower courts raise similar issues, all but one involve unique facts that might make a decision involving them less generally applicable. *See* Pet. at 22 & nn.18-19. Thus, the Vermont and Maine cases involve small school districts that pay for their students to attend private secondary schools because they do not maintain their own public secondary schools, while the Arizona

Equally important, there is no compelling reason for this Court to wait for another case, and every reason for it not to do so. This is not a novel matter, as to which this Court might wish to obtain the views of more lower courts before venturing into the arena. To the contrary, this Court squarely and exhaustively addressed precisely this issue 25 years ago, and the question now presented is whether or not that decision should be reconsidered. In the interim, this Court has issued numerous decisions involving the constitutionality of state aid to religious education in a variety of related contexts. In sum, as *amici* American Jewish Congress *et al.* ("AJC") observe, the Establishment Clause issue presented here "has been thoroughly explored in a wide variety of contexts." AJC Br. at 9. It is doubtful that further ventilation of the issue in the lower courts could produce much by way of analysis or insight that is not already available to this Court.

Should this Court decline to address the constitutionality of school voucher programs at this time, moreover, the result would be to leave in place the "constitutional cloud," PSC Br. at 4, that shrouds such programs—both those that have been enacted and those that are under consideration in a number of state legislatures. Nothing is to be gained by leaving this issue for another day, when a subsequent decision of this Court might require many schoolchildren and their families to rearrange their lives in response to what is then decided. Both the need for clarity on an important issue of constitutional law and concern for the impact of delay on the lives of those affected counsel granting the Writ of Certiorari in this case.

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litigation involves a tax credit for voluntary contributions to organizations that fund private-school scholarships. As to *Simmons-Harris v. Goff*, No. 97-1117 (Ohio), currently pending in the Ohio Supreme Court, state constitutional issues may well be decisive; the oral argument of that case on September 28, 1998, focused in significant part on whether enactment of the voucher program as part of an omnibus appropriations bill was contrary to a provision of the Ohio Constitution.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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